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### **Canada-European Union Digital Dialogue (May 27-28, 2019)**

<b>DAY 1 – ISED-hosted</b> <b>Monday May 27th – 9:00 to 16:30</b> <b>Executive Complex, C.D. Howe Building,</b> <b>235 Queen Street, Ottawa</b>			
<b>Time</b>	<b>Item</b>	<b>Description</b>	<b>Speakers</b>
9:00	<b>Registration and Meet and Greet</b>  <b>Executive Complex, CD Howe Building, 235 Queen Street, Ottawa</b>		
9:30 to 9:40 (5 minutes each party)	<b>Welcome and Opening Remarks</b>	Tour de table and overview of Canadian and EU digital ecosystems and innovation plans.  <i>Canada leads, EU responds.</i>	Associate DM David McGovern  DG Roberto Viola
9:40 to 10:40  <u>Presentations</u> (10-15 minutes each party)  <u>Discussion</u> (30-40 minutes)	<b>Panel 1: The Digital Economy</b>	Perspectives on the EU's and Canada's response to the new digital economy, including in relation to intellectual property, enhancing accessibility to digital industries and creating the right conditions for digital innovation.  <i>EU leads, Canada responds.</i>	[EU representative]  Lisa Setlakwe, Senior ADM, Strategy and Innovation Policy (SIPS)
10:40 to 11:00	<b>Health Break</b>		
11:00 to 12:00  <u>Presentations</u> (10-15 minutes each party)  <u>Discussion</u> (30-40 minutes)	<b>Panel 2: Quantum Technologies</b>	Quantum Technologies – panel on Canada and the EU's investments in quantum research, priorities and objectives.  <i>Canada leads, EU responds.</i>	Nipun Vats, ADM, Science and Research  Dr. Alan G. Steele, Chief Metrologist, Director General, NRC Metrology, National Research Council  <i>EU Representative:</i>  Gustav Kalbe, Head of Unit, High Performance Computing and Quantum Technology (will intervene via videoconference)
12:00 to 13:00	<b>Working Lunch: talk by Keynote Speaker Dr. Katherine Hume,</b> <b>Director, Business Development, Borealis AI,</b>		





Time	Item	Description	Speakers
13:00 to 14:00  <u>Presentations</u> (10-15 minutes each party)  <u>Discussion</u> (30- 40 minutes)	<b>Panel 3 (Part 1): Artificial intelligence: EU and Canadian perspectives on policy frameworks and AI applications.</b>	Presentation of Canada's and the EU's AI policy frameworks and AI applications, including use of AI in government.  <i>EU leads, Canada responds.</i> <i>(This is a joint session with ISED, PCH, and TBS)</i>	EU Representative, Bjoern Juretzki, Assistant to the DG, Directorate General for Communications Networks.  Lisa Setlakwe, Senior ADM, Strategy and Innovation Policy (SIPS)  Natalie McGee, Executive Director, Enterprise Strategic Planning, Treasury Board of Canada Secretariat  Director General Thomas Owen Ripley, Broadcasting, Copyright and Creative Marketplace Branch, Canadian Heritage and/or Marc Lemay – Director General, Cultural Industries Branch, Canadian Heritage
14:00 to 15:00  <u>Presentations</u> (15 minutes each party)  <u>Discussion</u> (15 minutes)	<b>Panel 3 (Part 2): Artificial Intelligence: international governance and collaboration</b>	Discussion of international initiatives including the International Panel on Artificial Intelligence.  <i>Canada leads, EU responds.</i> <i>(This session would include observers from PCH, GAC, PCO, TBS)</i>	Lisa Setlakwe, Senior ADM, SIPS  Shelley Whiting, Director General, Office of Human Rights, Freedoms and Inclusion, Global Affairs Canada  EU Representative, Bjoern Juretzki, Assistant to the DG, Directorate General for Communications Networks
15:00 to 15:15	<b>Health Break</b>		
15:15 to 16:00  <u>Presentations</u>	<b>Panel 4: Emerging technology/blockchain</b>	Discussion on EU and Canadian perspectives on blockchain policy frameworks.	Vidya Shankarnarayan, Director General, Digital Design Branch, ISED



Time	Item	Description	Speakers
(10-15 minutes each party)  <u>Discussion</u> (30- 40 minutes)		<i>EU leads, Canada responds.</i>	John Shannon, Director General, Digital Technology Research Centre, National Research Council  Director General Thomas Owen Ripley, Broadcasting, Copyright and Creative Marketplace Branch, Canadian Heritage  <i>EU Representative:</i>  Gustav Kalbe, Head of Unit, High Performance Computing and Quantum Technology
16:00 to 16:25	<b>Wrap up</b>	Moderators summarize key take-aways, outline next steps	Associate DM McGovern DG Viola
16:25 to 16:30	<b>Conclusion</b>	Photos and gift exchange	
16:30 to 18:00	<b>Private Time</b>		
18:00 to 20:00	<b>Reception</b>	<b>Lester B Pearson Building 125 Sussex Drive, 9th Floor Ottawa, Ontario</b>	Guests arrive between 18:00 and 18:30.  Welcoming remarks (18:30) from hosts followed by networking



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# Day 1 - May 27, 2019

## Session Overview & Speaking Notes

Joint Session (PCH & ISED) on Artificial Intelligence

TIME	EVENTS
May 27, 2019 12:00 – 4:00 p.m.	<p><b>JOINT SESSION (PCH &amp; ISED) ON ARTIFICIAL INTELLIGENCE</b> (4 hours)</p> <p><b>LOCATION:</b> C.D. Howe Building, 235 Queen Street, Ottawa</p> <p><b>LEAD:</b> This session is led by ISED</p> <p><b>Co-Host, moderator and head of delegation:</b></p> <ul style="list-style-type: none"> <li>David McGovern – Associate Deputy Minister, ISED</li> </ul> <p><b>Co-Host and head of delegation:</b></p> <ul style="list-style-type: none"> <li>Roberto Viola, Director General, European Commission, Directorate General for Communications Networks, Content and Technology</li> </ul> <p><b>ISED Delegation:</b></p> <ul style="list-style-type: none"> <li>David McGovern – Associate Deputy Minister, ISED</li> <li>Mitch Davies – Senior Assistant Deputy Minister of the Industry Sector</li> <li>Lisa Setlakwe – Senior Assistant Deputy Minister of the Strategy and Innovation Policy Sector</li> <li>Nipun Vats – Assistant Deputy Minister of the Science and Research Sector</li> <li>Vidya Shankarnarayan, Director General, Digital Design Branch, ISED</li> </ul> <p><b>Other Government of Canada Representatives:</b></p> <ul style="list-style-type: none"> <li>Natalie McGee, Executive Director, Enterprise Strategic Planning, Treasury Board of Canada Secretariat</li> <li>Shelley Whiting, Director General, Office of Human Rights, Freedoms and Inclusion, Global Affairs Canada</li> <li>John Shannon, Director General, Digital Technology Research Centre, National Research Council</li> </ul> <p><b>EU Presenters for session:</b></p> <ul style="list-style-type: none"> <li>Roberto Viola, Director General, European Commission, Directorate General for Communications Networks, Content and Technology</li> <li>EU Representative, Bjoern Juretzki, Assistant to the DG, Directorate General for Communications Networks</li> <li>Gustav Kalbe, Head of Unit, High Performance Computing and Quantum Technology</li> </ul>

	<p><b><u>PCH Delegation:</u></b></p> <ul style="list-style-type: none"> <li>• Owen Ripley, Director General, Broadcasting, Copyright and Creative Marketplace Branch.</li> <li>• Kahlil Cappuccino – Director, Copyright Policy</li> <li>• Chris Beall – Director, Strategic Policy (or delegate)</li> <li>• Ian Dalman – Manager, Creative Marketplace Lab on Data, Skills and Technology</li> </ul> <p><b><u>Overview</u></b></p> <ul style="list-style-type: none"> <li>• This is a joint session with ISED, PCH, GAC, and TBS.</li> <li>• Session will be moderated by David McGovern, Associate Deputy Minister (ISED).</li> <li>• Chris Beall will attend the full ISED portion of the Dialogues as an observer and take notes.</li> <li>• PCH is invited to take part in Panel 3 on artificial intelligence (AI) and Panel 4 on blockchain technology.</li> <li>• The PCH delegation on AI and blockchain is invited to join the meeting at the end of ISED's morning sessions for a keynote lunch.</li> <li>• The keynote address will be given by Dr. Kathryn Hume, Director of Business Development, Borealis AI. Biography available at TAB 8D.</li> <li>• Panel 3 on AI is divided in two parts. In Part 1, Canada and the EU will share presentations on their respective frameworks and AI applications. PCH will offer a short presentation on the use of AI and its implications for the creative marketplace. In Part 2, Canada and the EU will discuss international initiatives, including the International Panel on AI.</li> <li>• Panel 4 will focus on blockchain technology policy frameworks in Canada and the EU. PCH will offer a short presentation on the use of blockchain and its implications for the creative marketplace.</li> <li>• The presentations will be followed by a discussion session moderated by David McGovern, Associate Deputy Minister (ISED).</li> </ul>
11:55 – 12:00	<b>ARRIVAL OF PCH DELEGATION</b>
	<p><b><u>SEGMENT NOTES:</u></b></p> <ul style="list-style-type: none"> <li>• PCH delegation will be met by an ISED representative in the lobby of the C.D. Howe Building at 235 Queen Street, Ottawa.</li> <li>• PCH delegation will be escorted to executive boardrooms where dialogues are taking place.</li> </ul>
12:00 – 1:00	<b>BUFFET LUNCH &amp; KEYNOTE SPEAKER: DR. KATHRYN HUME, BOREALIS AI</b>
	<p><b><u>SEGMENT NOTES:</u></b></p> <ul style="list-style-type: none"> <li>• PCH to join for the lunch and keynote address.</li> </ul>
1:00 – 2:00	<b>PANEL 3 (PART 1) ARTIFICIAL INTELLIGENCE – POLICY FRAMEWORKS</b>
	<p><b><u>SEGMENT NOTES:</u></b></p> <ul style="list-style-type: none"> <li>• Presentation of Canada's and the EU's AI policy frameworks including use of AI in government.</li> <li>• EU begins followed by Canada.</li> <li>• EU Representative:</li> </ul>

	<ul style="list-style-type: none"> <li>○ Roberto Viola, Director General, European Commission, Directorate General for Communications Networks, Content and Technology</li> <li>○ Bjoern Juretzki, Assistant to the DG, Directorate General for Communications Networks</li> <li>• Presentations from Canada will include: <ul style="list-style-type: none"> <li>○ Lisa Setlakwe, Senior ADM, Strategy and Innovation Policy (SIPS)</li> <li>○ Natalie McGee, Executive Director, Enterprise Strategic Planning, Treasury Board of Canada Secretariat</li> <li>○ Owen Ripley, Broadcasting, Copyright and Creative Marketplace Branch</li> <li>○ Owen Ripley to offer PCH's presentation on AI and its use in the creative marketplace + policy implications of AI in the creative industries. Presentation available at TAB 1D.</li> </ul> </li> </ul>
2:00 – 3:00	<b>PANEL 3 (PART 2) ARTIFICIAL INTELLIGENCE – INTERNATIONAL GOVERNANCE</b>
	<p><b><u>SEGMENT NOTES:</u></b></p> <ul style="list-style-type: none"> <li>• Presentation of international initiatives including the International Panel on Artificial Intelligence.</li> <li>• Canada leads followed by EU.</li> <li>• Presentations from Canada will include: <ul style="list-style-type: none"> <li>○ Lisa Setlakwe, Senior ADM, SIPS</li> </ul> </li> <li>• EU Representative: <ul style="list-style-type: none"> <li>○ Roberto Viola, Director General, European Commission, Directorate General for Communications Networks, Content and Technology</li> <li>○ Bjoern Juretzki, Assistant to the DG, Directorate General for Communications Networks</li> </ul> </li> </ul>
3 :00 – 3 :15	<b>BREAK</b>
3 :15 – 4 :00	<b>PANEL 4 – BLOCKCHAIN TECHNOLOGY – ITS USE AND IMPLICATIONS ON INDUSTRY AND GOVERNMENT</b>
	<p><b><u>SEGMENT NOTES:</u></b></p> <ul style="list-style-type: none"> <li>• Discussion on EU and Canadian perspectives on blockchain policy frameworks.</li> <li>• EU leads, Canada responds</li> <li>• EU Representative: <ul style="list-style-type: none"> <li>○ Roberto Viola, Director General, European Commission, Directorate General for Communications Networks, Content and Technology</li> <li>○ Gustav Kalbe, Head of Unit, High Performance Computing and Quantum Technology [TBD]</li> </ul> </li> <li>• Presentations from Canada will include: <ul style="list-style-type: none"> <li>○ Vidya Shankarnarayan, Director General, Digital Design Branch, ISED</li> <li>○ John Shannon, Director General, Digital Technology Research Centre, National Research Council</li> <li>○ Owen Ripley, Director General, Broadcasting, Copyright and Creative Marketplace Branch, Canadian Heritage</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>Owen Ripley will provide PCH's presentation on the use of Blockchain and its implications for the creative marketplace. Presentation available at TAB 1E.</li> </ul>
4 :00 – 4 :25	<b>SESSION WRAP UP</b>
	<b><u>SEGMENT NOTES:</u></b> <ul style="list-style-type: none"> <li>Associate DM McGovern and DG Viola to summarize key take-aways, offer concluding comments and outline next steps.</li> </ul>
4:25 – 4 :30	<b>PHOTOS AND GIFT EXCHANGE</b>
	<b><u>SEGMENT NOTES:</u></b> <ul style="list-style-type: none"> <li>ISED and EU Delegation heads to exchange gifts and pose for photo.</li> </ul>
4:30	<b>END OF JOINT SESSION ON AI AND BLOCKCHAIN</b>





# Canada-EU Digital Dialogues

## ANNOTATED AGENDA

### Day 1 - ISED Dialogues, Joint Session on AI and Blockchain

<b>Co-Hosts and Official Heads of Canadian Delegation: David Mc Govern, Associate Deputy Minister, Innovation, Science and Economic Development (ISED)</b> <b>Co-Host and Official Head of EC Delegation: Roberto Viola, Director General, European Commission, Directorate General for Communications Networks, Content and Technology</b> <b>Moderator: David Mc Govern, Associate Deputy Minister, Innovation, Science and Economic Development</b>		
<b>DAY 1 – Monday May 27<sup>th</sup> – Joint Session on AI with ISED</b> <b>12:00 pm - 3:00 p.m.</b> <b>C.D. Howe Building, 235 Queen Street, 11<sup>th</sup> Floor Executive Boardrooms Complex</b>		
<b>Panel 3 Artificial intelligence: policy framework and AI in the creative market place</b> <b>This is a joint session with ISED, PCH and TBS, with observers from GAC</b> <b>Duration: 1 hour</b>		
Time	Topics	Speakers
11:55 am - 12:00	<b>Arrival of PCH Delegation</b>	
12:00 – 1:00	<b>Buffet Lunch &amp; Keynote Speaker</b> <b>Dr. Kathryn Hume, Director of Business Development, Borealis AI</b>	
<b>1:00 – 2:00</b>  <u><i>Presentations</i></u> <i>(10-15 minutes each party)</i>  <u><i>Discussion</i></u> <i>(30-40 minutes)</i>	<b>PART 1 – EU and Canadian perspectives on policy</b> Presentation of Canada's and the EU's AI policy frameworks and AI applications, including use of AI in government.  EU leads, Canada responds.  (This is a joint session with ISED, PCH, and TBS)	EU Representative, Bjoern Juretzki, Assistant to the DG, Directorate General for Communications Networks.  Lisa Setlakwe, Senior ADM, Strategy and Innovation Policy (SIPS)  Natalie McGee, Executive Director, Enterprise Strategic Planning, Treasury Board of Canada Secretariat  Thomas Owen Ripley, Director General, Broadcasting, Copyright and Creative Marketplace Branch, Canadian Heritage



	<b>PART 2 – Artificial Intelligence: international governance and collaboration</b> Discussion of international initiatives including the International Panel on AI  Canada leads, EU responds.  (This session would include observers from PCH, GAC and TBS)  <b>Discussion</b>	Lisa Setlakwe, Senior ADM, SIPS   EU Representative, Bjoern Juretzki, Assistant to the DG, Directorate General for Communications Networks
<b>Panel 4: Emerging technologies/blockchain – its use and implications on industry and government</b> This session would be led by ISED, with participants from PCH and NRC <b>Duration: 1 hour</b>		
<b>Time</b>	<b>Topics</b>	<b>Speakers</b>
2:00 – 3:00  <u><b>Presentations</b></u> <i>(15 minutes each party)</i>  <u><b>Discussion</b></u> <i>(15 minutes)</i>	<b>Blockchain Technology – Its Use and Implications on Industry and Government</b> Discussion on digital innovations, particularly Canadian and EU blockchain programs, potential Canada-EU synergies in research and development, and ways to use blockchain to enhance the efficiency and accountability of government and public services.  EU leads, Canada responds.	Vidya Shankarnarayan, Director General, Digital Design Branch, ISED  John Shannon, Director General, Digital Technology Research Centre, National Research Council  Director General Thomas Owen Ripley, Broadcasting, Copyright and Creative Marketplace Branch, Canadian Heritage
	<b>EU Presentation on AI</b>	EU Representative: Gustav Kalbe, Head of Unit, High Performance Computing and Quantum Technology
3:00 – 3:15	<b>Health Break</b>	



# Canada-EU Digital Dialogues

## Day 1 - Part 1B: AI and the Creative Marketplace

### Background

Artificial Intelligence (AI), is an emerging technology that will likely have a significant impact on creative industries. At Canadian Heritage, our policies and programs support the way Canadians create, share and consume creative content. Given that we are also responsible for developing, adapting and implementing various regulatory regimes affecting Canada's cultural sector, we keep a close eye on digital transformation in the creative market place. As an emerging technology, AI is forcing us to reconsider questions about copyright, ownership and re-numeration models for the creative sector.

Historically, quotas and required contributions were tools the Canadian government used to ensure that Canadian content was supported, disseminated and discovered in the creative marketplace. Today, more content is published online in a day than could be consumed in a lifetime, and AI-driven algorithms are the primary mode of curation and discovery in the digital environment. In light of this new reality where there is an abundance of machine curation, we are rethinking how we should engage with the creative marketplace to achieve a vibrant and successful creative sector and to ensure that Canadian citizens have access to diverse views that reflect Canadian life and democratic values. Finally, the advent of AI is raising questions on how to provide support for creators and creative industries so that productions are discovered by local and global consumers.

### Current State

Though Canadian Heritage is not the federal lead on AI, we are deeply impacted by the advancement of this kind of transformative technology. Its development has significant impact on major policy issues across the creative industries, including journalism, film, music and visual and performing arts. For example, Canadian Visual Artists such as George Legrady have begun experimenting with AI technology since long before it became a mainstream sensation following the media coverage of the AI-based artworks *The Next Rembrandt* and the *Portrait of Edmond Belamy*, (the latter sold for \$432,500 at a Christie's auction in October 2018). Today, Montreal boasts a vibrant arts community that uses AI to augment their artistic creations, ranging from contemporary poetry to interactive multimedia installations for theatrical performances.

From a legal perspective, Canada may be the first country to have witnessed the filing of a legal lawsuit around AI-based visual art. In August 2018, the visual artist Amel Chamandy filed a lawsuit in Quebec's Superior Court's against Adam Basanta. In this lawsuit Chamandy claims

that Basanta's AI-agent "art factory" produced an image that infringed on her copyright and the trademark she owns in her name.

This case is of great interest to the federal government as Canada's *Copyright Act* is currently being reviewed by two Parliamentary committees. The Standing Committee on Innovation, Science and Technology is leading the review and the Standing Committee on Canadian Heritage is contributing to the review with a study of remuneration models for artists and creative industries. Feedback through the study to date has seen creators express the concern that their works continue to be used to train AI systems without proper acknowledgement or remuneration. At the same time, organizations working with AI have recommended that the Government must intervene to allow for the copying of lawfully accessed works for the purpose of information analysis.

#### What's Next

The Government of Canada is monitoring the implications of transformative technologies such as machine learning AI and blockchain on the creative industries.

#### Discussion Questions

- Are there similar examples in the EU of AI-based creative experimentations used in various creative industries?
- Canadian stakeholders from the creative industries recommended that the artists or authors remain the first owner of copyright in works generated by AI. Have similar views been shared by stakeholders in the EU with regards to the use of AI?
- In Canada the advancement of AI in the creative industry has brought up policy challenges related to copyright and artist remuneration. Has the EU experienced similar policy challenges? Have there been any court challenges brought forward related to copyright or artist remuneration?

#### Desired Outcome of the Session

To engage in discussions that contemplate AI as related to global creative industries, in the hopes of future collaboration on research that will provide understanding on the disruption AI poses while not missing the opportunities for positive public policy outcomes.



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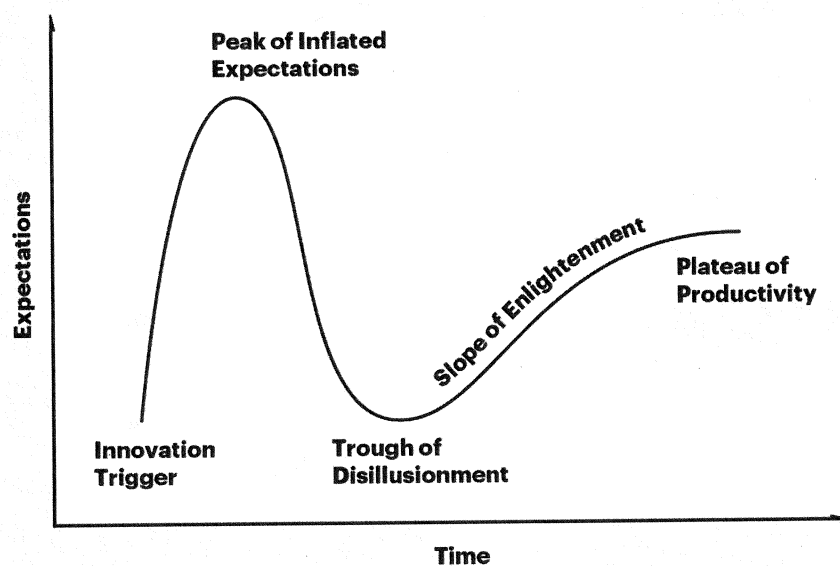


# Canada-EU Digital Dialogues

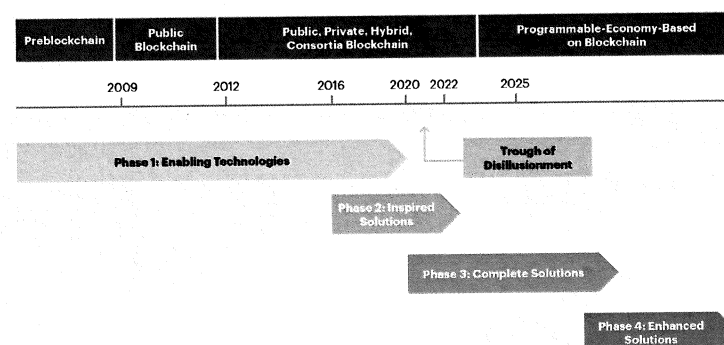
May 27-28, 2019

Blockchain and the Creative Marketplace

# The hype cycle and blockchain: disruption and opportunity



## Gartner's Blockchain Spectrum

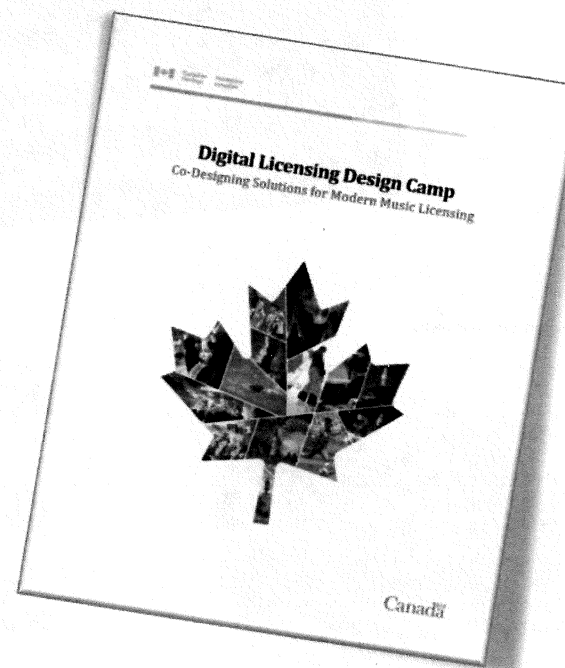
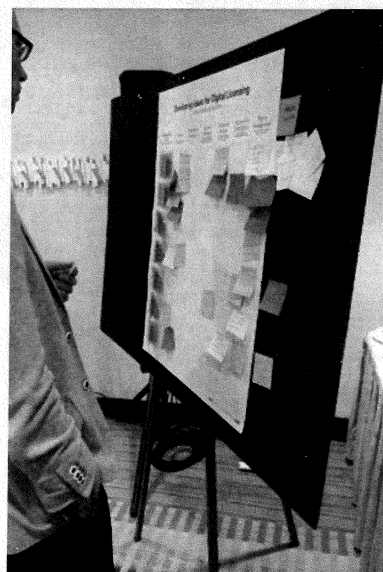
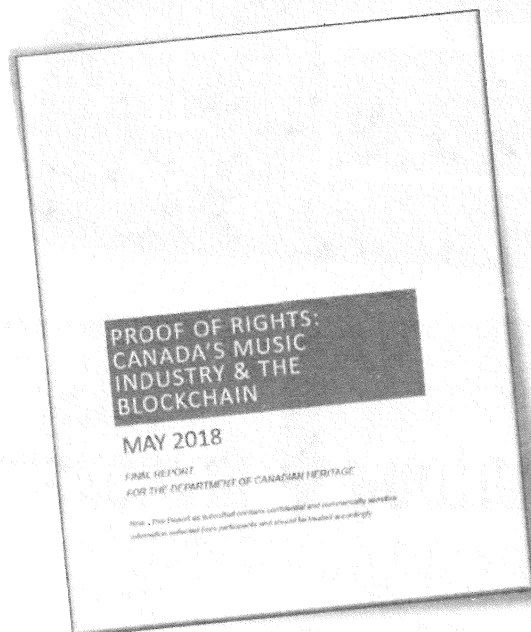


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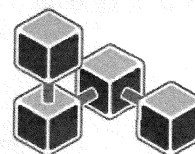
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# Government of Canada Research



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RESEARCH



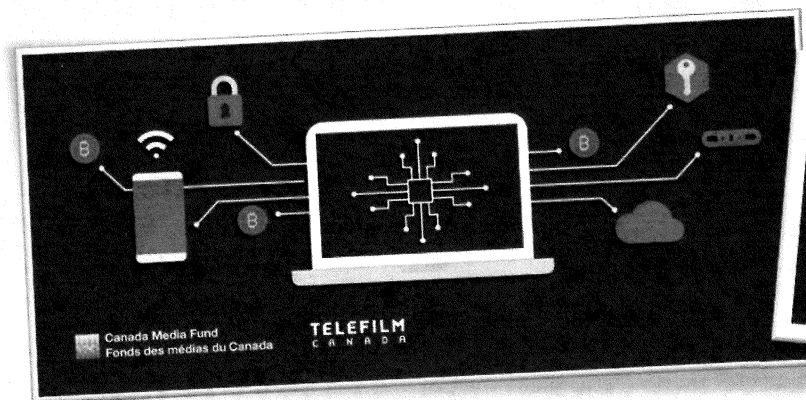
# Notable Canadian Projects



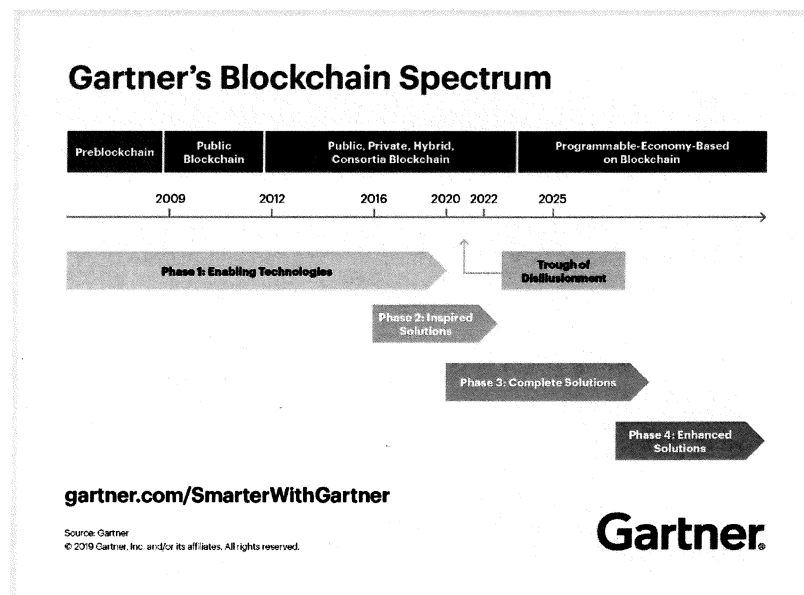
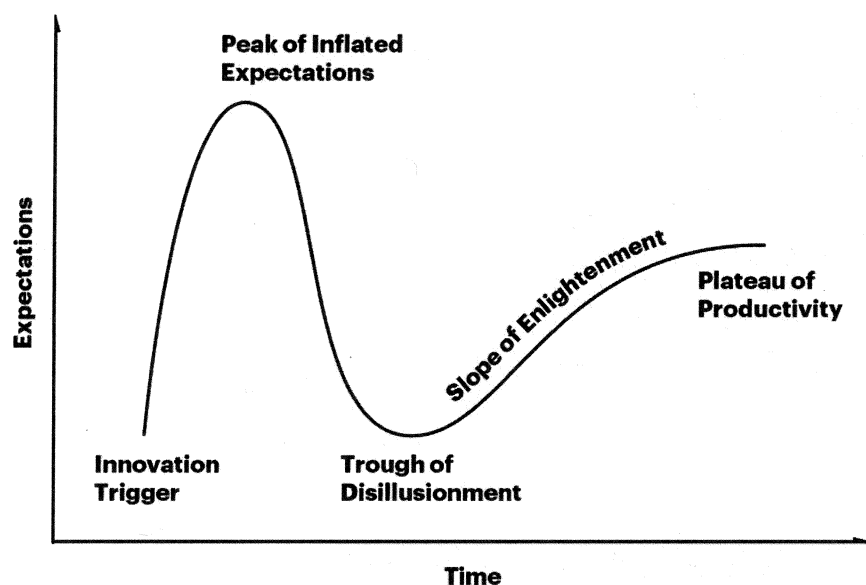
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Photo Credit: Victor Tongdee



# Next Steps as We Enter the Trough





## **Battaglia4, Caitlin (PCH)**

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**From:** Boyer2, Julie (PCH)  
**Sent:** Friday, November 8, 2019 4:18 PM  
**To:** Ahmed, Farhia (PCH); Olsen, Drew (PCH); Cappuccino, Kahlil (PCH)  
**Cc:** Ripley, Thomas Owen (PCH); Langlais, Dominique (PCH); St-Denis Laurin, Myriam (PCH); Lalonde, Fannie (PCH)  
**Subject:** RE: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Perfect, thank you everyone!

Julie Boyer

Conseillère principale en communications | Senior Communications Advisor  
Direction générale des communications, Affaires culturelles | Communications Branch, Cultural Affairs  
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Gouvernement du Canada | Government of Canada

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**From:** Ahmed, Farhia (PCH) <[farhia.ahmed@canada.ca](mailto:farhia.ahmed@canada.ca)>  
**Sent:** Friday, November 8, 2019 4:11 PM  
**To:** Olsen, Drew (PCH) <[drew.olsen@canada.ca](mailto:drew.olsen@canada.ca)>; Boyer2, Julie (PCH) <[julie.boyer2@canada.ca](mailto:julie.boyer2@canada.ca)>; Cappuccino, Kahlil (PCH) <[kahlil.cappuccino@canada.ca](mailto:kahlil.cappuccino@canada.ca)>  
**Cc:** Ripley, Thomas Owen (PCH) <[thomasowen.ripley@canada.ca](mailto:thomasowen.ripley@canada.ca)>; Langlais, Dominique (PCH) <[dominique.langlais@canada.ca](mailto:dominique.langlais@canada.ca)>; St-Denis Laurin, Myriam (PCH) <[myriam.st-denislaurin@canada.ca](mailto:myriam.st-denislaurin@canada.ca)>; Lalonde, Fannie (PCH) <[fannie.lalonde@canada.ca](mailto:fannie.lalonde@canada.ca)>  
**Subject:** RE: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Hi Julie,

Please use this version. Fixed 2 small typos.

### **QUESTION**

#### **1. Did the workshops take place, or are they scheduled to take place in the future?**

The workshops on Audiovisual and Copyright Legislative and Regulatory Reforms took place October 17-18, 2019 at the European Commission in Brussels. The workshop on Countering Disinformation and Diversity of Content Online is scheduled to take place November 28-29, 2019 in Gatineau.

#### **2. What was the outcome of the workshops?**

The workshops on Audiovisual and Copyright Legislative and Regulatory Reforms allowed Canadian and EU officials to exchange on their respective reviews on each matter. The EU provided an overview of their implementation of the revised *Audiovisual Media Services Directive (AVMSD)* as well as EU's Copyright in the *Digital Single Market Directive (DSMD)*. Canadian officials provided an overview of the recent Parliamentary reports related to the *Copyright Act* Review. Canadian officials also noted that an external review panel had

been appointed to review the *Broadcasting Act* and that a report is due out in January 2020. Officials expressed a mutual interest in continuing to learn and engage on these topics with a view to continue learning from their respective experiences.

**3. *What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?***

Officials reflected on the technological advancements quickly emerging in the creative marketplace and the potential uses of AI and blockchain technology. Officials agreed to continue discussions monitoring their respective markets and keeping each other informed.

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**From:** Olsen, Drew (PCH) <drew.olsen@canada.ca>

**Sent:** Friday, November 8, 2019 4:09 PM

**To:** Boyer2, Julie (PCH) <julie.boyer2@canada.ca>; Cappuccino, Kahlil (PCH) <kahlil.cappuccino@canada.ca>

**Cc:** Ripley, Thomas Owen (PCH) <thomasowen.ripley@canada.ca>; Langlais, Dominique (PCH)

<dominique.langlais@canada.ca>; St-Denis Laurin, Myriam (PCH) <myriam.st-denislaurin@canada.ca>; Ahmed, Farhia (PCH) <farhia.ahmed@canada.ca>; Lalonde, Fannie (PCH) <fannie.lalonde@canada.ca>

**Subject:** RE: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Hi Julie:

Attached are our proposed responses, DG approved.

Thanks.

**QUESTION**

**1. *Did the workshops take place, or are they scheduled to take place in the future?***

The workshops on Audiovisual and Copyright Legislative and Regulatory Reforms took place October 17-18, 2019 at the European Commission in Brussels. The workshop on Countering Disinformation and Diversity of Content Online is scheduled to take place November 28-29, 2019 in Gatineau.

**2. *What was the outcome of the workshops?***

The workshops on Audiovisual and Copyright Legislative and Regulatory Reforms allowed Canadian and EU officials to exchange on their respective reviews on each matter. The EU provided an overview their implementation of the revised Audiovisual Media Services Directive (AVMSD) as well as EU's Copyright in the Digital Single Market Directive (DSMD). Canadian officials provided an overview of the recent Parliamentary reports related to the Copyright Act Review. Canadian officials also noted that that an external review panel had been appointed to review the Broadcasting Act and that a report is due out in January 2020. Officials expressed a mutual interest in continuing to learn and engage on these topics with a view to continue learning from their respective experiences.

**3. *What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?***

Officials reflected on the technological advancements quickly emerging in the creative marketplace and the potential uses of AI and blockchain technology. Officials agreed to continue discussions monitoring their respective markets and keeping each other informed.

---

**From:** Boyer2, Julie (PCH) <[julie.boyer2@canada.ca](mailto:julie.boyer2@canada.ca)>  
**Sent:** Friday, November 8, 2019 12:22 PM  
**To:** Cappuccino, Kahlil (PCH) <[kahlil.cappuccino@canada.ca](mailto:kahlil.cappuccino@canada.ca)>; Olsen, Drew (PCH) <[drew.olsen@canada.ca](mailto:drew.olsen@canada.ca)>  
**Cc:** Ripley, Thomas Owen (PCH) <[thomasowen.ripley@canada.ca](mailto:thomasowen.ripley@canada.ca)>; Langlais, Dominique (PCH) <[dominique.langlais@canada.ca](mailto:dominique.langlais@canada.ca)>; St-Denis Laurin, Myriam (PCH) <[myriam.st-denislaurin@canada.ca](mailto:myriam.st-denislaurin@canada.ca)>  
**Subject:** APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues  
**Importance:** High

Good afternoon,

We have received the following media query with a deadline of end of day today. Could you please confirm that you are able to respond? Thank you!

**MEDIA**

**Murad Hemmadi**  
**The Logic**

**CONTEXT**

Reporter is writing about Canada-European Union Digital Dialogues. Specifically, a briefing note prepared for the deputy minister in July 2019 (obtained via ATIP; relevant sections attached) identifies a tentative timeline and work plan for the Dialogues.

It includes "Workshops on Audiovisual and Copyright Legislative and Regulatory Reform" in "Fall/Winter 2019" that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace."

The workshops were to be "focused discussion with working level officials and take place in Ottawa."

**QUESTION**

1. Did the workshops take place, or are they scheduled to take place in the future?
2. What was the outcome of the workshops?
3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?

**Deadline:**

COB today

Julie Boyer  
Conseillère principale en communications | Senior Communications Advisor  
Direction générale des communications, Affaires culturelles | Communications Branch, Cultural Affairs  
Ministère du Patrimoine canadien | Department of Canadian Heritage  
Gatineau, Canada K1A 0M5  
[julie.boyer2@canada.ca](mailto:julie.boyer2@canada.ca)  
Téléphone | Telephone : 819-994-5606  
Télécopieur | Facsimile : 819-953-5382  
Téléimprimeur (sans frais) : 1-888-997-3123 | Teletypewriter (toll-free) : 1-888-997-3123  
Gouvernement du Canada | Government of Canada



- PCH - vital role through our policies and programs in the cultural, civic and economic life of Canadians. Shaping of the cultural sector.
- Rise of transformative technologies and digital platforms, such as AI, are changing the way Canadians create, access and experience culture and the very nature of the Canadian creative marketplace.

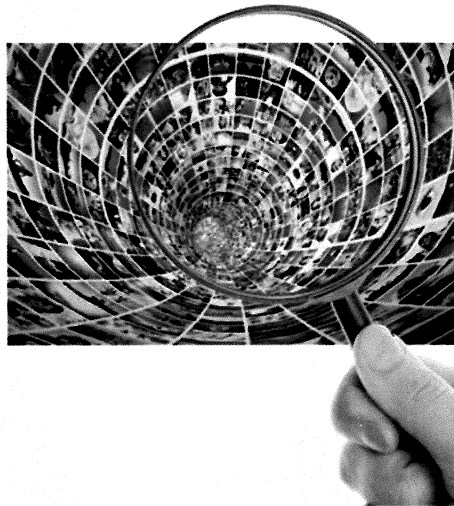
#### **Economic Impact**

- 2017 - the cultural sector contributed \$53.1 billion, 2.7% of total GDP. Culture jobs - 666,500.
- 2018 - the television and film production in Canada - \$9 billion, 179,000 direct and indirect jobs.
- Canada has 596 video game studios creating nearly 22,000 jobs and contributing \$3.7 billion to the economy.

#### **Policy, Legislative and Regulatory Impacts**

- AI is forcing us to address questions about copyright, ownership and remuneration models for the arts industry.
- Will elaborate on the work of our Creative Marketplace Lab tomorrow.
- Today, I will share examples of how AI is impacting the creative marketplace, and its policy implications.

## Policy Challenge 1: Creative Marketplace Discoverability



2

- Canadian creative marketplace - important economic driver, cultural/social foundation for national unity and identity.
- Human curation, scarcity of airwaves, quotas and required contributions were tools we used to ensure Canadian content in the creative marketplace.
- Machine curation - AI-driven algorithms are the primary mode of curation and discovery in the digital environment.
- Rebuilding the cultural policy toolbox:
  - What is the appropriate way for government to engage the creative marketplace to achieve our goal of a vibrant, relevant and successful Canadian cultural sector?
  - How can we ensure our citizens have proper access to diverse views that reflect Canadian life and democratic values?
  - How can we help our creators and creative industries to have their productions discovered by local and global consumers?
  - Realistic or effective to regulate transparency or prominence in AI algorithms?
  - Focus on helping the creative sector understand and produce the metadata necessary for discoverability in the machine-read internet?

## Policy Challenge 2: AI & Copyright

- Copyright is one of the key policy files shared between the Department of Canadian Heritage and the Department of Innovation, Science and Economic Development.
- A main area where policy issues emerge alongside the rise of AI, particularly for the creative marketplace. Entails three key policy considerations that AI generates in traditional copyright frameworks: 1) authorship; 2) AI as tool vs. co-author; and 3) source and mining.
- In every instance, I believe the overriding concern is, as is often the case in copyright, legal certainty and legitimacy.
- Players in the marketplace want to know how these new technologies interact with copyright and how they create.
- *Copyright Act* – needs to keep pace with technological developments. If the conceptions and frameworks in the *Act* can't stretch to address the times, the risk is that it might break entirely.

## AI art: who is the author?



Images generated by White using Barrat's code bear a striking resemblance to the Belamy portrait.  
Image: Tom White

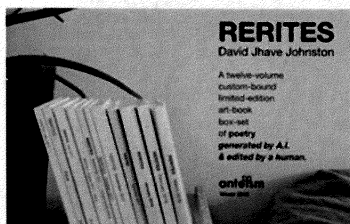


AI-made *Portrait of Edmond Belamy* (2018) © Obvious  
Sold for \$432,500 during a Christie's auction in October 2018.

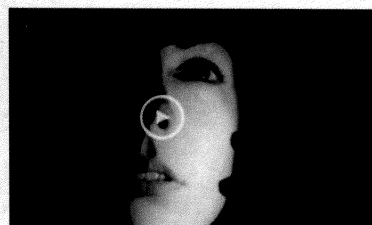
4

- AI generated art. *Portrait of Edmond Belamy* , \$432,500 at Christie's in 2018.
- Controversial - French art collective, *Obvious*, who sold and claim copyright, used an open source machine learning code, created by a Robbie Barrat, an American high school graduate.
- Canada, original creative works attract copyright protection and their author needs to have exercised skill and judgment.
- It is possible to conceive of this "originality, skill and judgment" as an inherently human feature although it may not be the only option.
- May not be the only option. Creation of the work could be attributed to the AI creator/programmer (in this case Robbie Barrat ), the AI user/curator (French art collective *Obvious*) or the AI/algorithm itself or perhaps none of them.
- AI-created works raise several potential policy challenges:
  - Should a creative work made by an artificial intelligence gain protection under current copyright law?
  - If so, who should be the author?

## AI: an augmentation “tool” or co-author?



ReRites by David Jhave Johnston, 2018-19  
AI-augmented poetry



Maxime Carbonneau, “Siri” (2019),  
theatrical performance interrogating AI

5

- Blurring of the concept of authorship when AI is being used as a tool to augment the creative process.
- RERITES by David Johnston (Montreal based artist) who fed a significant corpus of 20<sup>th</sup> century poems to an AI algorithm that generated at his choosing, 12 books of poems.
- Johnston describes his project as: “re-writing authorship: hybrid augmented enhanced evolutionary...the death of the author, the birth of computational author”.
- Is AI a tool used by a human author, or has use of AI has entered the realm of some new form of co-authorship?
- Montreal playwright, Maxime Carbonneau’s, play “Siri” –a discussion between a human actress and Siri. To what degree is Siri merely an artefact of everyday life, and to what degree is Siri a co-performer?
- In the context of copyright, AI requires we re-examine the tenets of authorship – human originality, skills, judgement and collaboration.



## AI: Source and mining



- AI produced a new work of art inspired from Rembrandt's catalogue.
- "Next Rembrandt" a collaboration of ING, Microsoft, TU Delft university, and the Mauritshuis Art Museum.
- What happens when someone uses AI to produce a new artwork inspired from the body of work of a single author?
- Does it matter if it is in the public domain? Not in the public domain? Term of protection applies? Do we need to re-imagine the notion of infringement?
- Infringement would arguably not cover works generated in this manner, just as they would not cover an artist merely inspired by the style of another artist.
- Canadian copyright law, typically an exception was coupled with a levy like private copying regime.
- Text and data mining - exception/levy in the Act as we scale up to match the amount of text and data needed to train algorithmic processes?

## Quebec Superior Court AI Art Lawsuit



Amel Chamandy, *Your World Without Paper* (2009)

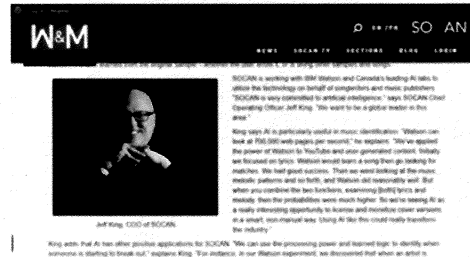


Adam Basanta, 85.81% match: Amel Chamandy  
*"Your World Without Paper"*, 2009 created in the  
project *All We'd Ever Need Is One Another*

7

- Highlight our role and duty to provide an environment of legal certitude.
- Montreal visual artist Amel Chamandy, lawsuit in Quebec's Superior Court against artist Adam Basanta. Claims that Basanta's AI algorithm "art factory" produced an image that infringed on her copyright and the trademark she owns on her name.
- Largely covered as a copyright issue - dynamic of source and result in AI processes. Basanta merely used AI to match (85% match) his creations with existing works and then name them, an act that in and of itself challenges notions of originality in copyright.
- Raises the question of whether we need to rethink our notions of infringement.

## Policy Challenge 3: AI & Rights Management (Enforcement)

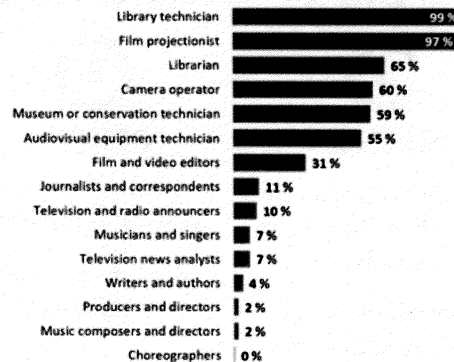


8

- The promise of AI as a tool for rights management in the digital sphere for creators. Empowering creators to effectively enforce their rights online.
- YouTube's Content ID rights management system, developed to cope with the tremendous amount of content that is uploaded to this platform on an hourly basis.
- Enables its users to control the distribution of rights by geographic locations and to decide how to proceed with releasing rights for content infringements that have been flagged by the AI algorithm.
- Canadian musical works collective rights organization SOCAN, have also been experimenting with AI for enforcement of copyright.
- Importance of providing creators with the necessary skills to understand such rights management systems and help them potentially deploy AI to track infringements.
- At Canadian Heritage, we have been monitoring this frontier actively, looking for opportunities where AI developments could help to realize positive public policy outcomes for creators.

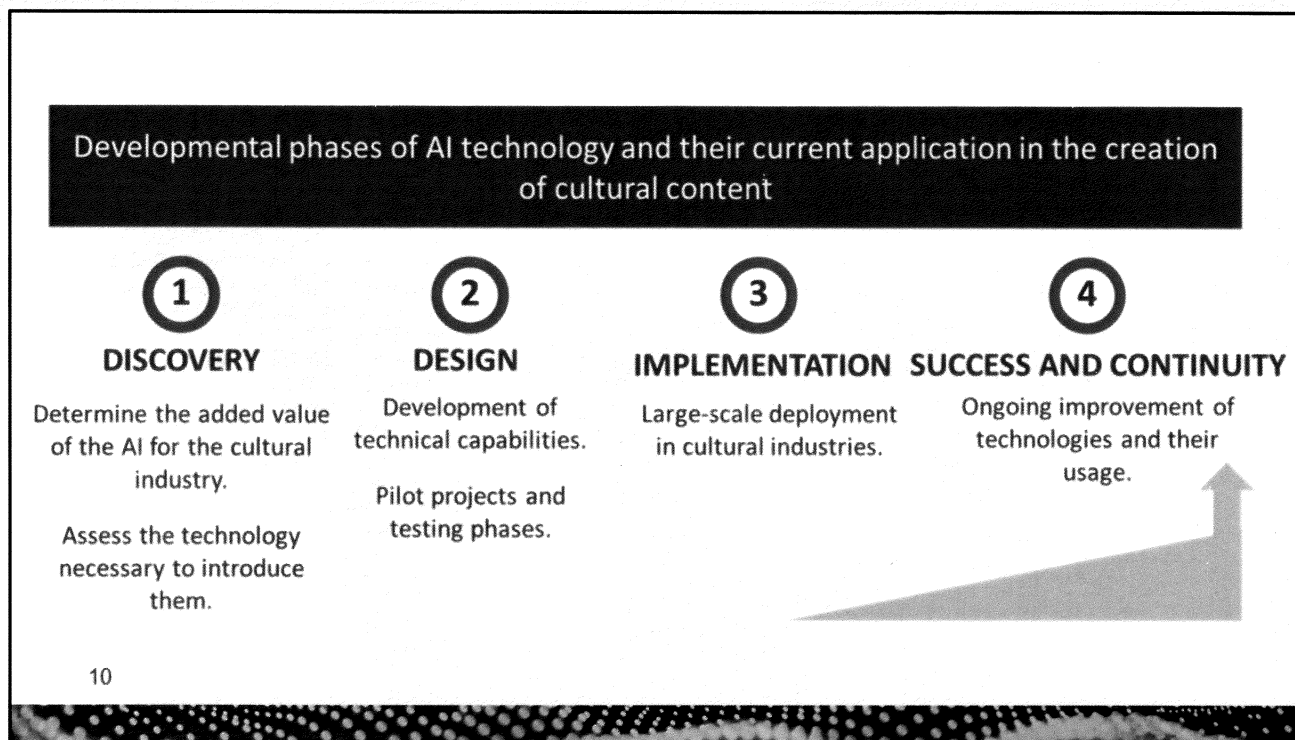
## Policy Challenge 4: The end of established careers in the Arts or beginning of new ones?

Probability of automation of cultural professions in 2033



9

- Old professions. New professions.
- Loss of creative professions due to automation. These include creative industry jobs like Library technicians, Film projectionists, Camera operators, Museum or conservation technicians, and Film and video editors, among others.
- Our role as a Federal government is to be prepared for these job loss potentials and to help plan safety-net and re-training programs accordingly.



- Finding the best opportunities for investing in the new creative marketplaces that will emerge following the rise of AI in the creative economy.
- Consider which stage of AI development in the cultural industries will benefit most from our intervention.
- Again it is about understanding and even re-conceptualizing the government toolbox, so that government can play an appropriate role.
- Should we offer grants or tax incentives during the discovery and design phases and/or issue new taxes during the implementation and success phases?
- Should we intervene at all or wait to see how the landscape is unfolding first? Is monitoring this technology enough at this stage?

## Policy Challenge 5: Expecting the unexpected, AI Gentrification!?

ACCUEIL INFO ÉCONOMIE IMMOBILIER

Quand l'intelligence artificielle menace les  
ateliers d'artistes de Montréal

Publié le lundi 7 janvier 2019



Le reportage de Jean-Sébastien Cloutier

11

- Conclude - policy challenge - one of our greatest fears as policy is to completely miss a weak signal and get caught off-guard by a challenging situation.
- In other words, having to put out fires instead of preventing them, or worse, just watching the flames turn things to ashes because it is too late act.
- AI hubs in Montreal - detrimental effect on Mile End neighborhood vibrant artistic and affordable community.
- Now "AI-gentrified". Increased real estate demand. Landlords evicting artists to rent space to AI and tech firms. Rent continued to increase and local artists found themselves no longer being able to afford their spaces.
- All this to say that we should be looking into the non-technological – that is economic, social and cultural – side effects of the rise of AI within and beyond the creative industries?
- Should we conduct more foresight exercises focusing on weak signals to

anticipate as many surprises as possible?

## Courage, Martine (PCH)

---

**From:** Média / Media (PCH)  
**Sent:** Wednesday, July 31, 2019 9:53 AM  
**To:** Murad Hemmadi  
**Cc:** Média / Media (PCH)  
**Subject:** RE: Media request, deadline 5 pm EDT Thu Aug 1

Hi Murad, thanks for your email. I've been enjoying the weather this week – hope you're having a good week as well!

I'll look into your request and let you know at later today if we can meet your deadline of tomorrow 5 pm.

Regards,

Martine

**From:** Murad Hemmadi <murad.hemmadi@thelogic.co>  
**Sent:** Wednesday, July 31, 2019 9:43 AM  
**To:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Subject:** Media request, deadline 5 pm EDT Thu Aug 1

Hi Martine,

Hope you're having a good week. I have a media request for Canadian Heritage concerning ongoing digital projects being carried out by the department. My deadline is 5 pm EDT tomorrow, Thursday August 1.

Specifically, a briefing note prepared for Minister of Canadian Heritage Pablo Rodriguez in April 2019 and obtained via an access to information request (see attached) states that department officials were "[m]eeting with the Canadian Intellectual Property Office for possible experiment with blockchain and copyright registration" in "spring 2019." (pg 3)

My questions are as follows:

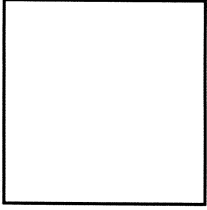
1. Did Canadian Heritage and CIPO conduct an experiment with blockchain and copyright registration?
2. What was the objective of the experiment, and how was it carried out?
3. Did the experiment involve any external copyright management agencies or organizations,?
4. What were the results of the experiment?
5. Does the department or CIPO plan to repeat the experiment or make the project permanent?

Thanks  
Murad

Murad Hemmadi  
Reporter  
+1(647) 975-5090  
[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)  
[@muradhem](https://www.instagram.com/muradhem)  
[telegram.me/muradhem](https://t.me/muradhem)



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## **Courage, Martine (PCH)**

---

**From:** Média / Media (PCH)  
**Sent:** Wednesday, July 31, 2019 10:10 AM  
**To:** PCH.O MINO Patrimoine / MINO Heritage O.PCH  
**Cc:** Média / Media (PCH); Khouri, Mireille (PCH)  
**Subject:** MINO heads-up: Media request, The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm  
**Attachments:** CH-Progress\_update\_digital\_initiatives\_February\_March\_2019-A-2019-00127.pdf

Hi there, heads up about the following request from Murad Hemmadi about digital projects, in particular, experiments with blockchain and copyright registration.

Martine  
-----

MEDIA  
Murad Hemmadi  
Reporter  
+1(647) 975-5090  
[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)

### **CONTEXT**

concerning ongoing digital projects being carried out by the department. Specifically, a briefing note prepared for Minister of Canadian Heritage Pablo Rodriguez in April 2019 and obtained via an access to information request (see attached) states that department officials were "[m]eeting with the Canadian Intellectual Property Office for possible experiment with blockchain and copyright registration" in "spring 2019." (pg 3)

### **QUESTIONS**

1. Did Canadian Heritage and CIPO conduct an experiment with blockchain and copyright registration?
2. What was the objective of the experiment, and how was it carried out?
3. Did the experiment involve any external copyright management agencies or organizations,?
4. What were the results of the experiment?
5. Does the department or CIPO plan to repeat the experiment or make the project permanent?

### **DEADLINE**

Account manager: Thursday, August 1, 12 pm  
Journalist: Thursday, August 1, 5 pm

## Courage, Martine (PCH)

---

**From:** Savoie, Daniel (PCH)  
**Sent:** Wednesday, July 31, 2019 1:50 PM  
**To:** Courage, Martine (PCH)  
**Subject:** RE: For your action: APPEL MEDIA CALL: The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm

---

**From:** Boyer2, Julie (PCH) <julie.boyer2@canada.ca>  
**Sent:** July 31, 2019 13:33  
**To:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>; PCH.O CommAffairesCulturelles / CulturalAffairsComms O.PCH <pch.commaffairesculturelles-culturalaffairscomms.pch@canada.ca>  
**Subject:** RE: For your action: APPEL MEDIA CALL: The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm

Here is the approved response. Thank you!

### CONTEXT

Ongoing digital projects being carried out by the department. Specifically, a briefing note prepared for Minister of Canadian Heritage Pablo Rodriguez in April 2019 and obtained via an access to information request (see attached) states that department officials were "[m]eeting with the Canadian Intellectual Property Office for possible experiment with blockchain and copyright registration" in "spring 2019." (pg 3)

### QUESTIONS

1. Did Canadian Heritage and CIPO conduct an experiment with blockchain and copyright registration?
2. What was the objective of the experiment, and how was it carried out?
3. Did the experiment involve any external copyright management agencies or organizations,?
4. What were the results of the experiment?
5. Does the department or CIPO plan to repeat the experiment or make the project permanent?

### RESPONSE:

In **March** 2019, the Blockchain Research Institute (BRI) published *Certifying Copyright in Canada on the Blockchain*, which explored how the Canadian Intellectual Property Office (CIPO) might leverage blockchain technology to add value to copyright registration at the national level.

Following up on this study, the Department of Canadian Heritage (PCH) met with CIPO to begin discussing a potential experiment with blockchain and copyright registration. **The** preliminary discussions have not resulted in the implementation of a project or experiment at this time.

### DEADLINE

Thursday, August 1, 12 pm

Julie Boyer  
Conseillère principale en communications | Senior Communications Advisor  
Direction générale des communications, Affaires culturelles | Communications Branch, Cultural Affairs  
Ministère du Patrimoine canadien | Department of Canadian Heritage  
Gatineau, Canada K1A 0M5

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Téléimprimeur (sans frais) : 1-888-997-3123 | Teletypewriter (toll-free) : 1-888-997-3123

Gouvernement du Canada | Government of Canada

---

**From:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>

**Sent:** Wednesday, July 31, 2019 10:13 AM

**To:** PCH.O CommAffairesCulturelles / CulturalAffairsComms O.PCH <[pch.commaffairesculturelles-culturalaffairscomms.pch@canada.ca](mailto:pch.commaffairesculturelles-culturalaffairscomms.pch@canada.ca)>

**Cc:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>

**Subject:** For your action: APPEL MEDIA CALL: The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm

Media request for your action.

Martine

---

**From:** Média / Media (PCH)

**Sent:** Wednesday, July 31, 2019 10:10 AM

**To:** PCH.O MINO Patrimoine / MINO Heritage O.PCH <[pch.minopatrimoine-minoheritage.pch@canada.ca](mailto:pch.minopatrimoine-minoheritage.pch@canada.ca)>

**Cc:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>; Khouri, Mireille (PCH) <[mireille.khouri@canada.ca](mailto:mireille.khouri@canada.ca)>

**Subject:** MINO heads-up: Media request, The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm

Hi there, heads up about the following request from Murad Hemmadi about digital projects, in particular, experiments with blockchain and copyright registration.

Martine

-----  
MEDIA

Murad Hemmadi

Reporter

+1(647) 975-5090

[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)

#### CONTEXT

concerning ongoing digital projects being carried out by the department. Specifically, a briefing note prepared for Minister of Canadian Heritage Pablo Rodriguez in April 2019 and obtained via an access to information request (see attached) states that department officials were "[m]eeting with the Canadian Intellectual Property Office for possible experiment with blockchain and copyright registration" in "spring 2019." (pg 3)

#### QUESTIONS

1. Did Canadian Heritage and CIPO conduct an experiment with blockchain and copyright registration?
2. What was the objective of the experiment, and how was it carried out?
3. Did the experiment involve any external copyright management agencies or organizations,?
4. What were the results of the experiment?
5. Does the department or CIPO plan to repeat the experiment or make the project permanent?

#### DEADLINE

Account manager: Thursday, August 1, 12 pm

Journalist: Thursday, August 1, 5 pm

## Courage, Martine (PCH)

---

**From:** Média / Media (PCH)  
**Sent:** Wednesday, July 31, 2019 2:14 PM  
**To:** PCH.O MINO Patrimoine / MINO Heritage O.PCH  
**Cc:** Média / Media (PCH); Khouri, Mireille (PCH)  
**Subject:** For MINO approval: APPEL MEDIA CALL: The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Hi there, for your approval please. Deadline is tomorrow end of day.

Martine

---

MEDIA  
Murad Hemmadi  
Reporter  
+1(647) 975-5090  
[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)

### CONTEXT

Ongoing digital projects being carried out by the department, specifically, a briefing note prepared for Minister of Canadian Heritage Pablo Rodriguez in April 2019 and obtained via an access to information request (see attached) states that department officials were "[m]eeting with the Canadian Intellectual Property Office for possible experiment with blockchain and copyright registration" in "spring 2019." (pg 3)

### QUESTIONS

1. Did Canadian Heritage and CIPO conduct an experiment with blockchain and copyright registration?
2. What was the objective of the experiment, and how was it carried out?
3. Did the experiment involve any external copyright management agencies or organizations,?
4. What were the results of the experiment?
5. Does the department or CIPO plan to repeat the experiment or make the project permanent?

### RESPONSE:

In March 2019, the Blockchain Research Institute (BRI) published *Certifying Copyright in Canada on the Blockchain*, which explored how the Canadian Intellectual Property Office (CIPO) might leverage blockchain technology to add value to copyright registration at the national level.

Following up on this study, the Department of Canadian Heritage (PCH) met with CIPO to begin discussing a potential experiment on blockchain and copyright registration. The preliminary discussions have not resulted in the implementation of a project or experiment at this time.

### DEADLINE

Thursday, August 1, 12 pm

## **Courage, Martine (PCH)**

---

**From:** Média / Media (PCH)  
**Sent:** Thursday, August 1, 2019 4:36 PM  
**Subject:** Activités médiatiques - Media Activities 01/08/2019

## **ACTIVITÉS MÉDIATIQUES - MEDIA ACTIVITIES 01/08/2019**

### **EN ATTENTE / PENDING**

#### **Murad Hemmadi, The Logic, Canada/China cultural trade**

Received: Wednesday, July 31, 10 a.m.

1. Did the department bring Chinese buyers or participate in Canada/China initiatives at any of the following events: TIFF in September 2018; MIGS in November 2018; C2MTL in May 2019; the Banff World Media Festival in June 2019; the CINARS Biennale in November 2018; or Luminato in June 2019?
2. Has the department made any plans or commitments to bring Chinese buyers or participate in Canada/China initiatives at any of the following events: TIFF in September 2019; MIGS in November 2019; C2MTL in May 2020; the Banff World Media Festival in 2020; the CINARS Biennale in November 2020; or Luminato in June 2020?
3. Did the department support Canadian participation at or arrange targeted micro-missions by Canadian companies or individuals in the creative industries to any of the following events in China: ChinaJoy in August 2018; the China International Import Expo in November 2018; the Beijing International Film Festival in April 2019; the Shanghai International Film Festival in June 2019; or the China International Cartoon and Animation Festival in April and May 2019.
4. Has the department made any plans or commitments to support Canadian participation at or arrange targeted micro-missions by Canadian companies or individuals in the creative industries to any of the following events in China: ChinaJoy in August 2019; the China International Import Expo in November 2019; the Beijing International Film Festival in 2020; the Shanghai International Film Festival in 2020; or the China International Cartoon and Animation Festival in 2020?

The document also states that the department wanted to collaborate with the Shanghai Consul General on "determining how to respond to Giant Network Group's interest in organizing a mission to Canada and facilitating opportunities for Shanghai Media Group to engage further with Canada's creative industries."

5. Did the department and/or the Shanghai Consul General facilitate a mission to Canada by Giant Network Group?
6. Did the department and/or the Shanghai Consul General facilitate communication between Shanghai Media Group and Canadian media outlets or other Canadian companies in the creative industries?

Deadline: Friday, August 2, 5 p.m.

### **AVEC MINO (PATRIMOINE) / WITH MINO (HERITAGE)**

#### **Murad Hemmadi, The Logic, Blockchain and copyright**

Received: Wednesday, July 31, 9:45 a.m.

A briefing note prepared for Minister Rodriguez in April 2019 (obtained via an access to information) request states that department officials were "[m]eeting with the Canadian Intellectual Property Office for possible experiment with blockchain and copyright registration" in "spring 2019." (pg 3)

1. Did Canadian Heritage and CIPO conduct an experiment with blockchain and copyright registration?
2. What was the objective of the experiment, and how was it carried out?
3. Did the experiment involve any external copyright management agencies or organizations?
4. What were the results of the experiment?
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Deadline: Thursday, August 1, 5 p.m.

## **AVEC MINO (SPORT) / WITH MINO (SPORT)**

**NIL**

## **AVEC MINO (TLOF) / WITH MINO (TOLF)**

**NIL**

## **FERMÉ / CLOSED**

### **Laurianne Croteau, Radio-Canada, Suivi sur le financement des festivals au Québec**

Reçu : le vendredi 26 juillet, 12h

Combien de subventions de Patrimoine vont aux festivals et festivités au Québec par année?

Question de suivi : Quel est le budget pour les festivals et festivités au Québec pour l'année financière en cours?

Réponse proposé : Les fonds octroyés par Patrimoine canadien pour les festivals et célébrations au Québec s'élèvent à environ à 15 millions de dollars pour l'année financière en cours. Ce montant représente une hausse moyenne d'environ 10 pourcent par festival par rapport à l'année précédente.

L'enveloppe globale destinée au financement des festivals passe de 50 millions \$ à 75 millions \$ par année. Concrètement, cela signifie une hausse de financement variant en moyenne entre 10 % et 25 % par festival. Le gouvernement du Canada investit 10,5 millions de dollars pour appuyer près de 400 célébrations et rendez-vous culturels sur l'ensemble du territoire québécois durant la période estivale.



Échéance : lundi le 29 juillet, COB

## Courage, Martine (PCH)

---

**From:** Courage, Martine (PCH)  
**Sent:** Thursday, August 1, 2019 4:51 PM  
**To:** Bélanger, Louis (PCH)  
**Cc:** Média / Media (PCH)  
**Subject:** RE: DUE TODAY For MINO approval: APPEL MEDIA CALL: The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm

10-4.

Martine

---

**From:** Bélanger, Louis (PCH) <louis.belanger@canada.ca>  
**Sent:** Thursday, August 1, 2019 4:49 PM  
**To:** Courage, Martine (PCH) <martine.courage@canada.ca>; PCH.O MINO Patrimoine / MINO Heritage O.PCH <pch.minopatrimoine-minoheritage.pch@canada.ca>  
**Cc:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Subject:** RE: DUE TODAY For MINO approval: APPEL MEDIA CALL: The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm

Add that line then

To find out more about the study and its conclusions:

<https://www.blockchainresearchinstitute.org/project/certifying-copyright-in-canada-on-the-blockchain/>

Louis Belanger  
Directeur/Director Communications  
Tel: 613-953-6747

---

**From:** Courage, Martine (PCH) <martine.courage@canada.ca>  
**Sent:** Thursday, August 1, 2019 4:44 PM  
**To:** Bélanger, Louis (PCH) <louis.belanger@canada.ca>; PCH.O MINO Patrimoine / MINO Heritage O.PCH <pch.minopatrimoine-minoheritage.pch@canada.ca>  
**Cc:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Subject:** RE: DUE TODAY For MINO approval: APPEL MEDIA CALL: The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm

From what I can see, PCH didn't do the study – the Blockchain Research Institute did.

Martine

---

**From:** Bélanger, Louis (PCH) <louis.belanger@canada.ca>  
**Sent:** Thursday, August 1, 2019 4:43 PM  
**To:** Courage, Martine (PCH) <martine.courage@canada.ca>; PCH.O MINO Patrimoine / MINO Heritage O.PCH <pch.minopatrimoine-minoheritage.pch@canada.ca>  
**Cc:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Subject:** Re: DUE TODAY For MINO approval: APPEL MEDIA CALL: The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm

We cannot talk about any conclusions/ findings?

We did a study and then what ? We can't talk about the conclusions?

Sent from my Bell Samsung device over Canada's largest network.

----- Original message -----

From: "Courage, Martine (PCH)" <[martine.courage@canada.ca](mailto:martine.courage@canada.ca)>

Date: 2019-08-01 4:26 PM (GMT-05:00)

To: "PCH.O MINO Patrimoine / MINO Heritage O.PCH" <[pch.minopatrimoine-minoheritage.pch@canada.ca](mailto:pch.minopatrimoine-minoheritage.pch@canada.ca)>

Cc: "Média / Media (PCH)" <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>

Subject: DUE TODAY For MINO approval: APPEL MEDIA CALL: The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm

Salut Simon, je sais que tu es très occupé avec la tournée à Saguenay, mais je me demandais si tu pourrais regarder cette demande et l'approuver?

L'échéance était pour fin de journée.

Si non, j'en informerais le journaliste.

Merci!

Martine

---

**From:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>

**Sent:** Wednesday, July 31, 2019 2:14 PM

**To:** PCH.O MINO Patrimoine / MINO Heritage O.PCH <[pch.minopatrimoine-minoheritage.pch@canada.ca](mailto:pch.minopatrimoine-minoheritage.pch@canada.ca)>

**Cc:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>; Khouri, Mireille (PCH) <[mireille.khouri@canada.ca](mailto:mireille.khouri@canada.ca)>

**Subject:** For MINO approval: APPEL MEDIA CALL: The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm

Hi there, for your approval please. Deadline is tomorrow end of day.

Martine

---

MEDIA

Murad Hemmadi

Reporter

+1(647) 975-5090

[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)

#### CONTEXT

Ongoing digital projects being carried out by the department, specifically, a briefing note prepared for Minister of Canadian Heritage Pablo Rodriguez in April 2019 and obtained via an access to information request (see attached) states that department officials were "[m]eeting with the Canadian Intellectual Property Office for possible experiment with

blockchain and copyright registration" in  
"spring 2019." (pg 3)

#### QUESTIONS

1. Did Canadian Heritage and CIPO conduct an experiment with blockchain and copyright registration?
2. What was the objective of the experiment, and how was it carried out?
3. Did the experiment involve any external copyright management agencies or organizations,?
4. What were the results of the experiment?
5. Does the department or CIPO plan to repeat the experiment or make the project permanent?

#### RESPONSE:

In March 2019, the Blockchain Research Institute (BRI) published *Certifying Copyright in Canada on the Blockchain*, which explored how the Canadian Intellectual Property Office (CIPO) might leverage blockchain technology to add value to copyright registration at the national level.

Following up on this study, the Department of Canadian Heritage (PCH) met with CIPO to begin discussing a potential experiment on blockchain and copyright registration. The preliminary discussions have not resulted in the implementation of a project or experiment at this time.

#### DEADLINE

Thursday, August 1, 12 pm

## Courage, Martine (PCH)

---

**From:** Média / Media (PCH)  
**Sent:** Thursday, August 1, 2019 4:57 PM  
**To:** andrew.baldwin@pco-bcp.gc.ca  
**Cc:** Média / Media (PCH)  
**Subject:** For PCO info: APPEL MEDIA CALL: The Logic, blockchain and copyright - deadline Thu Aug 1, 5 pm

Hi Andrew, a request for your awareness.

---

### MEDIA

Murad Hemmadi  
Reporter  
+1(647) 975-5090  
[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)

### CONTEXT

Ongoing digital projects being carried out by the department, specifically, a briefing note prepared for Minister of Canadian Heritage Pablo Rodriguez in April 2019 and obtained via an access to information request (see attached) states that department officials were "[m]eeting with the Canadian Intellectual Property Office for possible experiment with blockchain and copyright registration" in "spring 2019." (pg 3)

### QUESTIONS

1. Did Canadian Heritage and CIPO conduct an experiment with blockchain and copyright registration?
2. What was the objective of the experiment, and how was it carried out?
3. Did the experiment involve any external copyright management agencies or organizations,?
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5. Does the department or CIPO plan to repeat the experiment or make the project permanent?

### RESPONSE:

In March 2019, the Blockchain Research Institute (BRI) published *Certifying Copyright in Canada on the Blockchain*, which explored how the Canadian Intellectual Property Office (CIPO) might leverage blockchain technology to add value to copyright registration at the national level.

(To find out more about the study and its conclusions: <https://www.blockchainresearchinstitute.org/project/certifying-copyright-in-canada-on-the-blockchain/>)

Following up on this study, the Department of Canadian Heritage (PCH) met with CIPO to begin discussing a potential experiment on blockchain and copyright registration. The preliminary discussions have not resulted in the implementation of a project or experiment at this time.

### DEADLINE

Thursday, August 1, 5 pm

## Courage, Martine (PCH)

---

**From:** Murad Hemmadi <murad.hemmadi@thelogic.co>  
**Sent:** Friday, August 2, 2019 10:45 AM  
**To:** Média / Media (PCH)  
**Subject:** Re: Media request, deadline 5 pm EDT Thu Aug 1

Thanks Martine.

Murad Hemmadi  
Reporter  
+1(647) 975-5090  
[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)  
[@muradhem](https://t.me/muradhem)  
[telegram.me/muradhem](https://t.me/muradhem)

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On Thu, Aug 1, 2019 at 5:08 PM Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)> wrote:

Hi Murad,

In March 2019, the Blockchain Research Institute (BRI) published *Certifying Copyright in Canada on the Blockchain*, which explored how the Canadian Intellectual Property Office (CIPO) might leverage blockchain technology to add value to copyright registration at the national level.

(To find out more about the study and its conclusions: <https://www.blockchainresearchinstitute.org/project/certifying-copyright-in-canada-on-the-blockchain/>)

Following up on this study, the Department of Canadian Heritage (PCH) met with CIPO to begin discussing a potential experiment on blockchain and copyright registration. The preliminary discussions have not resulted in the implementation of a project or experiment at this time.

Regards,

Martine Courage

Porte-parole | Spokesperson

Service de relations avec les médias | Media Relations Service

Direction générale des communications | Communications Branch

Patrimoine canadien | Canadian Heritage

o. 819-953-7886 | 1-866-569-6155

**From:** Murad Hemmadi <[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)>  
**Sent:** Wednesday, July 31, 2019 9:43 AM  
**To:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>  
**Subject:** Media request, deadline 5 pm EDT Thu Aug 1

Hi Martine,

Hope you're having a good week. I have a media request for Canadian Heritage concerning ongoing digital projects being carried out by the department. My deadline is 5 pm EDT tomorrow, Thursday August 1.

Specifically, a briefing note prepared for Minister of Canadian Heritage Pablo Rodriguez in April 2019 and obtained via an access to information request (see attached) states that department officials were "[m]eeting with the Canadian Intellectual Property Office for possible experiment with blockchain and copyright registration" in "spring 2019." (pg 3)

My questions are as follows:

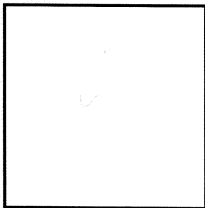
1. Did Canadian Heritage and CIPO conduct an experiment with blockchain and copyright registration?
2. What was the objective of the experiment, and how was it carried out?
3. Did the experiment involve any external copyright management agencies or organizations,?
4. What were the results of the experiment?
5. Does the department or CIPO plan to repeat the experiment or make the project permanent?

Thanks

Murad

**Murad Hemmadi**  
**Reporter**  
**+1(647) 975-5090**  
**[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)**  
**[@muradhem](#)**  
**[telegram.me/muradhem](https://t.me/muradhem)**

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## **Courage, Martine (PCH)**

---

**From:** Média / Media (PCH)  
**Sent:** Friday, August 2, 2019 4:32 PM  
**Subject:** Activités médiatiques - Media Activities 02/08/2019

## **ACTIVITÉS MÉDIATIQUES - MEDIA ACTIVITIES 02/08/2019**

### **EN ATTENTE / PENDING**

#### **Gordon, Graeme, Post Media, Digital Literacy Citizenship funding**

Received: August 2, 4:00 pm

The July 2 news release says that a few other projects are being considered. Have these other projects been funded? If so, what are they?

Deadline: Thursday, August 8, 2019

### **AVEC MINO (PATRIMOINE) / WITH MINO (HERITAGE)**

#### **Murad Hemmadi, The Logic, Canada/China cultural trade**

Received: Wednesday, July 31, 10 a.m.

1. Did the department bring Chinese buyers or participate in Canada/China initiatives at any of the following events: TIFF in September 2018; MIGS in November 2018; C2MTL in May 2019; the Banff World Media Festival in June 2019; the CINARS Biennale in November 2018; or Luminato in June 2019?
2. Has the department made any plans or commitments to bring Chinese buyers or participate in Canada/China initiatives at any of the following events: TIFF in September 2019; MIGS in November 2019; C2MTL in May 2020; the Banff World Media Festival in 2020; the CINARS Biennale in November 2020; or Luminato in June 2020?
3. Did the department support Canadian participation at or arrange targeted micro-missions by Canadian companies or individuals in the creative industries to any of the following events in China: ChinaJoy in August 2018; the China International Import Expo in November 2018; the Beijing International Film Festival in April 2019; the Shanghai International Film Festival in June 2019; or the China International Cartoon and Animation Festival in April and May 2019.
4. Has the department made any plans or commitments to support Canadian participation at or arrange targeted micro-missions by Canadian companies or individuals in the creative industries to any of the following events in China: ChinaJoy in August 2019; the China International Import Expo in November 2019; the Beijing International Film Festival in 2020; the Shanghai International Film Festival in 2020; or the China International Cartoon and Animation Festival in 2020?

The document also states that the department wanted to collaborate with the Shanghai Consul General on "determining how to respond to Giant Network Group's interest in organizing a mission to Canada and facilitating opportunities for Shanghai Media Group to engage further with Canada's creative industries."

5. Did the department and/or the Shanghai Consul General facilitate a mission to Canada by Giant Network Group?
6. Did the department and/or the Shanghai Consul General facilitate communication between Shanghai Media Group and Canadian media outlets or other Canadian companies in the creative industries?

The answer to your questions from the perspective of the Department of Canadian Heritage is no. For any questions pertaining to the involvement of the Canadian Consulate in China, please contact Global Affairs Canada.

Deadline: Friday, August 2, 5 p.m.

## **AVEC MINO (SPORT) / WITH MINO (SPORT)**

**NIL**

## **AVEC MINO (TLOF) / WITH MINO (TOLF)**

**NIL**

## **FERMÉ / CLOSED**

### **Murad Hemmadi, The Logic, Blockchain and copyright**

Received: Wednesday, July 31, 9:45 a.m.

A briefing note prepared for Minister Rodriguez in April 2019 (obtained via an access to information) request states that department officials were "[m]eeting with the Canadian Intellectual Property Office for possible experiment with blockchain and copyright registration" in "spring 2019." (pg 3)

1. Did Canadian Heritage and CIPO conduct an experiment with blockchain and copyright registration?
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(To find out more about the study and its conclusions:

<https://www.blockchainresearchinstitute.org/project/certifying-copyright-in-canada-on-the-blockchain/>)

Following up on this study, the Department of Canadian Heritage (PCH) met with CIPO to begin discussing a potential experiment on blockchain and copyright registration. The preliminary discussions have not resulted in the implementation of a project or experiment at this time.

Deadline: Thursday, August 1, 5 p.m.

## Courage, Martine (PCH)

---

**From:** Média / Media (PCH)  
**Sent:** Friday, November 8, 2019 10:18 AM  
**To:** Murad Hemmadi  
**Cc:** Média / Media (PCH)  
**Subject:** RE: Media request, deadline 5 pm EDT Mon Nov 11

Hi Murad, we've received your request and will start working on it. Given that Monday is a statutory holiday, I'm not sure we can meet your deadline, but I'll check and get back to you.

Martine Courage

Porte-parole, Services de relations avec les médias  
Patrimoine canadien, Gouvernement du Canada  
[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)  
Tél. : 819-994-9101 | sans frais 1-866-569-6155 (au Canada seulement)  
ATS (sans frais) : 1-888-997-3123

Spokesperson, Media Relations Services  
Canadian Heritage, Government of Canada  
[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)  
Tel: 819-994-9101 | toll free 1-866-569-6155 (in Canada only)  
ATS (toll free) : 1-888-997-3123

**From:** Murad Hemmadi <[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)>  
**Sent:** Friday, November 8, 2019 9:30 AM  
**To:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>  
**Subject:** Media request, deadline 5 pm EDT Mon Nov 11

Hi there,  
My name is Murad Hemmadi and I'm a reporter at *The Logic*. I have a media request concerning the Canada-European Union Digital Dialogues. My deadline is 5 pm EDT on Monday November 11.

Specifically, a briefing note prepared for the deputy minister in July 2019 (obtained via ATIP; relevant sections attached) identifies a tentative timeline and work plan for the Dialogues. It includes "Workshops on Audiovisual and Copyright Legislative and Regulatory Reform" in "Fall/Winter 2019" that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace." The workshops were to be "focused discussion with working level officials and take place in Ottawa."

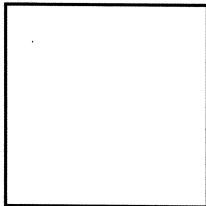
My questions are as follows:

1. Did the workshops take place, or are they scheduled to take place in the future?
2. What was the outcome of the workshops?
3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?

Thanks  
Murad

Murad Hemmadi  
Reporter  
+1(647) 975-5090  
[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)  
[@muradhem](https://www.instagram.com/muradhem)  
[telegram.me/muradhem](https://t.me/muradhem)

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## **Courage, Martine (PCH)**

---

**From:** Média / Media (PCH)  
**Sent:** Friday, November 8, 2019 10:40 AM  
**To:** Bujold, Marthe (PCH); Beh, Patricia (PCH)  
**Cc:** Mondou, Isabelle (PCH); Courville, Renée (PCH); Labelle, Nadine (PCH); McLeod, Isabelle (PCH); Média / Media (PCH); Collin, Dominique (PCH); Fauvelle, Martine (PCH); Labonte, Natalie (PCH); Marchand, Roxane (PCH); Maury, Dominique (PCH); Reinert, Chantal (PCH)  
**Subject:** Heads-up for DMO: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues  
**Attachments:** CH-  
Letter\_to\_DG\_Connect\_following\_Ottawa\_visit\_for\_inaugural\_Canada\_EU\_Digital\_Dialogues-A-2019-00229.pdf

Media call received this morning for your awareness. Reporter requested response by end of day Monday, which is a stat holiday. I'm checking if we can meet the deadline. If not, we'll negotiate a new timeline with the reporter.

Martine Courage  
Porte-parole | Spokesperson  
Service de relations avec les médias | Media Relations Service  
Direction générale des communications | Communications Branch  
Patrimoine canadien | Canadian Heritage  
o. 819-953-7886 | 1-866-569-6155

---

**MEDIA**  
**Murad Hemmadi**  
**The Logic**

### **CONTEXT**

Reporter is writing about Canada-European Union Digital Dialogues. Specifically, a briefing note prepared for the deputy minister in July 2019 (obtained via ATIP; relevant sections attached) identifies a tentative timeline and work plan for the Dialogues.

It includes "Workshops on Audiovisual and Copyright Legislative and Regulatory Reform" in "Fall/Winter 2019" that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace."

The workshops were to be "focused discussion with working level officials and take place in Ottawa."

### **QUESTION**

1. Did the workshops take place, or are they scheduled to take place in the future?
2. What was the outcome of the workshops?
3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?

### **Deadline:**

Account executive: TBD but ideally 3 pm Friday, November 8, 2019 (if possible)  
Journalist: TBD but ideally COB today (reporter requested end of day, Monday, Nov. 11 )

## **Courage, Martine (PCH)**

---

**From:** Média / Media (PCH)  
**Sent:** Friday, November 8, 2019 10:57 AM  
**To:** pco-bcp-gc-ca, PC-carlotta-collins (Ext.)  
**Cc:** Média / Media (PCH)  
**Subject:** Heads-up for PCO: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues  
**Attachments:** CH-  
Letter\_to\_DG\_Connect\_following\_Ottawa\_visit\_for\_inaugural\_Canada\_EU\_Digital\_Dialogues-A-2019-00229.pdf

Please disregard the last message.

-----

Good morning, Carlotta, new media request for your awareness. Please let us know if you want to weigh in.

Regards,

Martine

-----

**MEDIA**  
**Murad Hemmadi**  
**The Logic**

### **CONTEXT**

Reporter is writing about Canada-European Union Digital Dialogues. Specifically, a briefing note prepared for the deputy minister in July 2019 (obtained via ATIP; relevant sections attached) identifies a tentative timeline and work plan for the Dialogues.

It includes "Workshops on Audiovisual and Copyright Legislative and Regulatory Reform" in "Fall/Winter 2019" that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace."

The workshops were to be "focused discussion with working level officials and take place in Ottawa."

### **QUESTION**

1. Did the workshops take place, or are they scheduled to take place in the future?
2. What was the outcome of the workshops?
3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?

### **Deadline:**

Account executive: TBD but ideally 3 pm Friday, November 8, 2019 (if possible)

Journalist: TBD but ideally COB today (reporter requested end of day, Monday, Nov. 11 )

## **Courage, Martine (PCH)**

---

**From:** Courage, Martine (PCH)  
**Sent:** Friday, November 8, 2019 11:45 AM  
**To:** 'Collins, Carlotta'  
**Cc:** Média / Media (PCH)  
**Subject:** RE: Heads-up for PCO: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Sounds good, thanks!

Martine

---

**From:** Collins, Carlotta <Carlotta.Collins@pco-bcp.gc.ca>  
**Sent:** Friday, November 8, 2019 11:44 AM  
**To:** Courage, Martine (PCH) <martine.courage@canada.ca>; Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Subject:** RE: Heads-up for PCO: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Hi, Martine, no I don't need to review it. Thanks.

---

**From:** Courage, Martine (PCH) <martine.courage@canada.ca>  
**Sent:** Friday, November 08, 2019 11:41 AM  
**To:** Collins, Carlotta <Carlotta.Collins@pco-bcp.gc.ca>; Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Subject:** RE: Heads-up for PCO: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Sorry I just meant disregard the first email as I had included my email to another group above the actual request.

Martine

---

**From:** pco-bcp-gc-ca, PC-carlotta-collins (Ext.) <Carlotta.Collins@pco-bcp.gc.ca>  
**Sent:** Friday, November 8, 2019 11:35 AM  
**To:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Subject:** RE: Heads-up for PCO: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Hi, am I still to disregard this one? Thanks.

---

**From:** Collins, Carlotta  
**Sent:** Friday, November 08, 2019 11:29 AM  
**To:** 'Média / Media (PCH)' <PCH.media-media.PCH@canada.ca>  
**Subject:** RE: Heads-up for PCO: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Hi Martine, I'm checking on this.

---

**From:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Sent:** Friday, November 08, 2019 10:55 AM  
**To:** Collins, Carlotta <Carlotta.Collins@pco-bcp.gc.ca>  
**Cc:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Subject:** Heads-up for PCO: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Good morning, Carlotta, new media request for your awareness. Please let us know if you want to weigh in.

Regards,

Martine

---

**From:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>

**Sent:** Friday, November 8, 2019 10:40 AM

**To:** Bujold, Marthe (PCH) <[marthe.bujold@canada.ca](mailto:marthe.bujold@canada.ca)>; Beh, Patricia (PCH) <[patricia.beh@canada.ca](mailto:patricia.beh@canada.ca)>

**Cc:** Mondou, Isabelle (PCH) <[isabelle.mondou@canada.ca](mailto:isabelle.mondou@canada.ca)>; Courville, Renée (PCH) <[renee.courville@canada.ca](mailto:renee.courville@canada.ca)>; Labelle, Nadine (PCH) <[nadine.labelle@canada.ca](mailto:nadine.labelle@canada.ca)>; McLeod, Isabelle (PCH) <[isabelle.mcleod@canada.ca](mailto:isabelle.mcleod@canada.ca)>; Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>; Collin, Dominique (PCH) <[dominique.collin@canada.ca](mailto:dominique.collin@canada.ca)>; Fauvelle, Martine (PCH) <[martine.fauvelle@canada.ca](mailto:martine.fauvelle@canada.ca)>; Labonte, Natalie (PCH) <[natalie.labonte@canada.ca](mailto:natalie.labonte@canada.ca)>; Marchand, Roxane (PCH) <[roxane.marchand@canada.ca](mailto:roxane.marchand@canada.ca)>; Maury, Dominique (PCH) <[dominique.maury@canada.ca](mailto:dominique.maury@canada.ca)>; Reinert, Chantal (PCH) <[chantal.reinert@canada.ca](mailto:chantal.reinert@canada.ca)>

**Subject:** Heads-up for DMO: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Media call received this morning for your awareness. Reporter requested response by end of day Monday, which is a stat holiday. I'm checking if we can meet the deadline. If not, we'll negotiate a new timeline with the reporter.

Martine Courage

Porte-parole | Spokesperson

Service de relations avec les médias | Media Relations Service

Direction générale des communications | Communications Branch

Patrimoine canadien | Canadian Heritage

o. 819-953-7886 | 1-866-569-6155

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## MEDIA

Murad Hemmadi

The Logic

## CONTEXT

Reporter is writing about Canada-European Union Digital Dialogues. Specifically, a briefing note prepared for the deputy minister in July 2019 (obtained via ATIP; relevant sections attached) identifies a tentative timeline and work plan for the Dialogues.

It includes "Workshops on Audiovisual and Copyright Legislative and Regulatory Reform" in "Fall/Winter 2019" that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace."

The workshops were to be "focused discussion with working level officials and take place in Ottawa."

## QUESTION

1. Did the workshops take place, or are they scheduled to take place in the future?
2. What was the outcome of the workshops?
3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?

## Deadline:

Account executive: TBD but ideally 3 pm Friday, November 8, 2019 (if possible)

Journalist: TBD but ideally COB today (reporter requested end of day, Monday, Nov. 11 )



## **Courage, Martine (PCH)**

---

**From:** Boyer2, Julie (PCH)  
**Sent:** Friday, November 8, 2019 12:15 PM  
**To:** Média / Media (PCH); PCH.O CommAffairesCulturelles / CulturalAffairsComms O.PCH  
**Subject:** RE: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

On it

Julie Boyer  
Conseillère principale en communications | Senior Communications Advisor  
Direction générale des communications, Affaires culturelles | Communications Branch, Cultural Affairs  
Ministère du Patrimoine canadien | Department of Canadian Heritage  
Gatineau, Canada K1A 0M5  
[julie.boyer2@canada.ca](mailto:julie.boyer2@canada.ca)  
Téléphone | Telephone : 819-994-5606  
Télécopieur | Facsimile : 819-953-5382  
Téléimprimeur (sans frais) : 1-888-997-3123 | Teletypewriter (toll-free) : 1-888-997-3123  
Gouvernement du Canada | Government of Canada

---

**From:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Sent:** Friday, November 8, 2019 10:29 AM  
**To:** PCH.O CommAffairesCulturelles / CulturalAffairsComms O.PCH <pch.commaffairesculturelles-culturalaffairscomms.pch@canada.ca>  
**Cc:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Subject:** APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Good morning, Cultural Affairs,

Request below from Murad Hemmadi. Wondering if you think it's possible to get the response quickly today or if this might take a bit more time.

Please advise and I'll let the reporter know. I'm guessing earliest Tuesday COB for final response.

Thanks!

Martine

---

**MEDIA**  
**Murad Hemmadi**  
**The Logic**

### **CONTEXT**

Reporter is writing about Canada-European Union Digital Dialogues. Specifically, a briefing note prepared for the deputy minister in July 2019 (obtained via ATIP; relevant sections attached) identifies a tentative timeline and work plan for the Dialogues.

It includes "Workshops on Audiovisual and Copyright Legislative and Regulatory Reform" in "Fall/Winter 2019" that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace."

The workshops were to be "focused discussion with working level officials and take place in Ottawa."

**QUESTION**

1. Did the workshops take place, or are they scheduled to take place in the future?
2. What was the outcome of the workshops?
3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?

**Deadline:**

Account executive: TBD but ideally 3 pm Friday, November 8, 2019 (if possible)

Journalist: TBD but ideally COB today (reporter requested end of day, Monday, Nov. 11 )

## **Courage, Martine (PCH)**

---

**From:** Média / Media (PCH)  
**Sent:** Friday, November 8, 2019 4:31 PM  
**To:** Maury, Dominique (PCH)  
**Cc:** Collin, Dominique (PCH); Labonte, Natalie (PCH); Marchand, Roxane (PCH); Média / Media (PCH); Reinert, Chantal (PCH)  
**Subject:** For A/DG Comms approval: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Pour approbation SVP, merci.

---

### **MEDIA**

**Murad Hemmadi**  
**The Logic**

### **CONTEXT**

Reporter is writing about Canada-European Union Digital Dialogues. Specifically, a briefing note prepared for the deputy minister in July 2019 (obtained via ATIP; relevant sections attached) identifies a tentative timeline and work plan for the Dialogues.

It includes "Workshops on Audiovisual and Copyright Legislative and Regulatory Reform" in "Fall/Winter 2019" that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace."

The workshops were to be "focused discussion with working level officials and take place in Ottawa."

### **QUESTION**

1. Did the workshops take place, or are they scheduled to take place in the future?
2. What was the outcome of the workshops?
3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?

### **PROPOSED RESPONSE**

The workshops on Audiovisual and Copyright Legislative and Regulatory Reforms took place October 17-18, 2019 at the European Commission in Brussels. The workshop on Countering Disinformation and Diversity of Content Online is scheduled to take place November 28-29, 2019 in Gatineau.

The workshops on Audiovisual and Copyright Legislative and Regulatory Reforms allowed Canadian and EU officials to exchange on their respective reviews on each matter. The EU provided an overview of their implementation of the revised *Audiovisual Media Services Directive (AVMSD)* as well as EU's Copyright in the *Digital Single Market Directive (DSMD)*. Canadian officials provided an overview of the recent Parliamentary reports related to the *Copyright Act Review*. Canadian officials also noted that an external panel had been appointed to review the *Broadcasting Act* and that a report is due in January 2020. Officials expressed a mutual interest in continuing to engage on these topics and learning from their respective experiences.

Officials also reflected on technological advancements that are emerging in the creative marketplace and on the potential uses of AI and blockchain technologies. Officials agreed to continue discussions and monitoring their respective markets.

**Deadline:**

Journalist: TBD but ideally COB today (reporter requested end of day, Monday, Nov. 11 )

## **Courage, Martine (PCH)**

---

**From:** Média / Media (PCH)  
**Sent:** Friday, November 8, 2019 4:43 PM  
**Subject:** ACTIVITÉS MÉDIATIQUES - MEDIA ACTIVITIES 8/11/2019

### **ACTIVITÉS MÉDIATIQUES - MEDIA ACTIVITIES 8/11/2019**

**EN ATTENTE / PENDING**

**NIL**

**AVEC DG COMM / WITH DG COMM**

**NIL**

**AVEC CSM (PATRIMOINE | SPORT) / WITH DMO (HERITAGE | SPORT)**

#### **Murad Hemmadi, The Logic, Canada-EU Digital Dialogues**

Received: Friday, Nov. 8, 10:30 am

Reporter's questions refer to a July 2019 briefing note for DM mentioning Workshops on Audiovisual and Copyright Legislative and Regulatory Reform in Fall/Winter 2019 that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace.

1. Did the workshops take place, or are they scheduled to take place in the future?
2. What was the outcome of the workshops?
3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?

Deadline: the reporter requested Monday, Nov. 11, end of day

#### **Michael Swan, The Catholic Register regarding the Indigenous Languages Act**

Received Wednesday, November 6 at 12:45 p.m.

Follow-up questions on Indigenous language preservation: I am surprised that nobody in the government isn't trying to figure out which languages will survive the next three or four generations. After all, if you've just passed an Indigenous Languages Act and it's the Year of Indigenous Languages and UNESCO is speculating that 40 per cent of the languages spoken now won't make it to the next century, surely somebody in government with a degree in linguistics or anthropology is trying to figure out which languages are most endangered? Doesn't somebody have a list from most endangered to least endangered?

Deadline: as soon as possible

**AVEC CSM (LANGUES OFFICIELLES) / WITH DMO (OFFICIAL LANGUAGES)**

NIL

**AVEC LIAISON MINISTÉRIELLE (LO) / WITH MINISTERIAL LIAISON (OL)**

NIL

**AVEC BCP / WITH PCO**

NIL

**FERMÉ / CLOSED**

**Christopher Nardi, Le Journal de Montréal à propos de la Commission des champs de bataille nationaux**

Recu : le 8 novembre 11:30

Q1. Serait-il possible de m'expliquer les raisons pour lesquelles Mme Gagné a été suspendue avec salaire, SVP? S'il y a des documents à l'appui, j'aimerais bien les recevoir aussi.

Q2. Et quelles sont les représentations qu'elle a fait les 17, 20 et 23 septembre dernier?

Les informations relatives à l'emploi d'un individu sont considérées comme personnelles. De même, la correspondance de nature confidentielle est considérée comme une information personnelle. Nous ne pouvons commenter les informations personnelles protégées par la Loi sur la protection des renseignements personnels.

Échéance : le 8 novembre en fin de journée

**Guillaume Bourgault-Côté, Le Devoir, Netflix / géants du Web (questions de suivi)**

Reçu : le 6 novembre, 14h20

1. Que l'accord Netflix soit confidentiel ou pas, la compagnie s'est engagée à remplir deux conditions (investissements de 500 millions et de 25 millions) pour pouvoir créer Netflix Canada. Qui, au gouvernement, fait la vérification de savoir si les conditions ont été remplies? Je présume qu'il y a un suivi qui est fait.

2. Netflix dit publiquement avoir complété son engagement. Je veux savoir ce qui survient dans ce genre de cas: la compagnie est libre d'opérer comme elle l'entend (en respectant les autres règles, bien sûr)? Il n'y a pas de «contrat» à renouveler pour demeurer au pays?

1. Dans le cadre de la *Loi sur l'investissement Canada*, un non-Canadien dont l'investissement a été approuvé par le ministre suite à un examen visant à déterminer si l'investissement proposé serait vraisemblablement à l'avantage net du Canada, est tenu de fournir au Directeur des investissements, sur demande, toute information requise afin qu'il puisse déterminer si l'investissement est effectué en conformité avec la demande d'examen et les engagements qui ont pu être pris à l'égard du ministre.

2. De façon générale, à la fin de la période d'engagement, lorsqu'un non-Canadien démontre au Directeur des investissements qu'il a respecté tous les engagements pris à l'égard du ministre dans le cadre de l'investissement, le Directeur des investissements informe le non-Canadien qu'il n'est plus tenu de soumettre de rapports d'activités en vertu de la Loi, au-delà de la période d'engagement prévue.

Échéance : jeudi le 7 novembre en fin de journée

## **Courage, Martine (PCH)**

---

**From:** Courage, Martine (PCH)  
**Sent:** Friday, November 8, 2019 4:45 PM  
**To:** Savoie, Daniel (PCH)  
**Subject:** RE: MARTINE FW: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Thanks Dan!

Martine

---

**From:** Savoie, Daniel (PCH) <daniel.savoie@canada.ca>  
**Sent:** Friday, November 8, 2019 4:20 PM  
**To:** Courage, Martine (PCH) <martine.courage@canada.ca>  
**Subject:** MARTINE FW: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

I'll take this, if you're already stepped out.

---

**From:** Boyer2, Julie (PCH) <julie.boyer2@canada.ca>  
**Sent:** November 8, 2019 16:19  
**To:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>; PCH.O CommAffairesCulturelles / CulturalAffairsComms O.PCH <pch.commaffairesculturelles-culturalaffairscomms.pch@canada.ca>  
**Subject:** RE: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Martine,

Here is the approved response. Thank you!

***1. Did the workshops take place, or are they scheduled to take place in the future?***

The workshops on Audiovisual and Copyright Legislative and Regulatory Reforms took place October 17-18, 2019 at the European Commission in Brussels. The workshop on Countering Disinformation and Diversity of Content Online is scheduled to take place November 28-29, 2019 in Gatineau.

***2. What was the outcome of the workshops?***

The workshops on Audiovisual and Copyright Legislative and Regulatory Reforms allowed Canadian and EU officials to exchange on their respective reviews on each matter. The EU provided an overview of their implementation of the revised *Audiovisual Media Services Directive (AVMSD)* as well as EU's Copyright in the *Digital Single Market Directive (DSMD)*. Canadian officials provided an overview of the recent Parliamentary reports related to the *Copyright Act* Review. Canadian officials also noted that an external review panel had been appointed to review the *Broadcasting Act* and that a report is due out in January 2020. Officials expressed a mutual interest in continuing to learn and engage on these topics with a view to continue learning from their respective experiences.

***3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?***

Officials reflected on the technological advancements quickly emerging in the creative marketplace and the potential uses of AI and blockchain technology. Officials agreed to continue discussions monitoring their respective markets and keeping each other informed.

Julie Boyer

Conseillère principale en communications | Senior Communications Advisor  
Direction générale des communications, Affaires culturelles | Communications Branch, Cultural Affairs  
Ministère du Patrimoine canadien | Department of Canadian Heritage  
Gatineau, Canada K1A 0M5

[julie.boyer2@canada.ca](mailto:julie.boyer2@canada.ca)

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Téléimprimeur (sans frais) : 1-888-997-3123 | Teletypewriter (toll-free) : 1-888-997-3123

Gouvernement du Canada | Government of Canada

---

**From:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>

**Sent:** Friday, November 8, 2019 10:29 AM

**To:** PCH.O CommAffairesCulturelles / CulturalAffairsComms O.PCH <[pch.commaffairesculturelles-culturalaffairscomms.pch@canada.ca](mailto:pch.commaffairesculturelles-culturalaffairscomms.pch@canada.ca)>

**Cc:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>

**Subject:** APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Good morning, Cultural Affairs,

Request below from Murad Hemmadi. Wondering if you think it's possible to get the response quickly today or if this might take a bit more time.

Please advise and I'll let the reporter know. I'm guessing earliest Tuesday COB for final response.

Thanks!

Martine

---

**MEDIA**

**Murad Hemmadi**

**The Logic**

**CONTEXT**

Reporter is writing about Canada-European Union Digital Dialogues. Specifically, a briefing note prepared for the deputy minister in July 2019 (obtained via ATIP; relevant sections attached) identifies a tentative timeline and work plan for the Dialogues.

It includes "Workshops on Audiovisual and Copyright Legislative and Regulatory Reform" in "Fall/Winter 2019" that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace."

The workshops were to be "focused discussion with working level officials and take place in Ottawa."

**QUESTION**

1. Did the workshops take place, or are they scheduled to take place in the future?
2. What was the outcome of the workshops?



3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?

**Deadline:**

Account executive: TBD but ideally 3 pm Friday, November 8, 2019 (if possible)

Journalist: TBD but ideally COB today (reporter requested end of day, Monday, Nov. 11 )

## Courage, Martine (PCH)

---

**From:** Média / Media (PCH)  
**Sent:** Friday, November 8, 2019 6:21 PM  
**To:** Murad Hemmadi  
**Cc:** Média / Media (PCH)  
**Subject:** RE: Media request, deadline 5 pm EDT Mon Nov 11

Hi Murad, we should be able to get you a response by Tuesday morning/before noon.

Martine

---

**From:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Sent:** Friday, November 8, 2019 10:18 AM  
**To:** Murad Hemmadi <murad.hemmadi@thelogic.co>  
**Cc:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Subject:** RE: Media request, deadline 5 pm EDT Mon Nov 11

Hi Murad, we've received your request and will start working on it. Given that Monday is a statutory holiday, I'm not sure we can meet your deadline, but I'll check and get back to you.

Martine Courage

Porte-parole, Services de relations avec les médias  
Patrimoine canadien, Gouvernement du Canada  
[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)  
Tél. : 819-994-9101 | sans frais 1-866-569-6155 (au Canada seulement)  
ATS (sans frais) : 1-888-997-3123

Spokesperson, Media Relations Services  
Canadian Heritage, Government of Canada  
[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)  
Tel: 819-994-9101 | toll free 1-866-569-6155 (in Canada only)  
ATS (toll free) : 1-888-997-3123

**From:** Murad Hemmadi <murad.hemmadi@thelogic.co>  
**Sent:** Friday, November 8, 2019 9:30 AM  
**To:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>  
**Subject:** Media request, deadline 5 pm EDT Mon Nov 11

Hi there,

My name is Murad Hemmadi and I'm a reporter at *The Logic*. I have a media request concerning the Canada-European Union Digital Dialogues. My deadline is 5 pm EDT on Monday November 11.

Specifically, a briefing note prepared for the deputy minister in July 2019 (obtained via ATIP; relevant sections attached) identifies a tentative timeline and work plan for the Dialogues. It includes "Workshops on Audiovisual and Copyright Legislative and Regulatory Reform" in "Fall/Winter 2019" that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace." The workshops were to be "focused discussion with working level officials and take place in Ottawa."

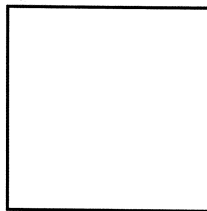
My questions are as follows:

1. Did the workshops take place, or are they scheduled to take place in the future?
2. What was the outcome of the workshops?
3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?

Thanks  
Murad

Murad Hemmadi  
Reporter  
+1(647) 975-5090  
[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)  
[@muradhem](https://twitter.com/muradhem)  
[telegram.me/muradhem](https://t.me/muradhem)

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## Courage, Martine (PCH)

---

**From:** Courage, Martine (PCH)  
**Sent:** Friday, November 8, 2019 7:17 PM  
**To:** Bujold, Marthe (PCH)  
**Subject:** Re: For DMO approval: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Merci Marthe :) bonne soirée

Martine Courage  
Porte-parole / Spokesperson  
Relations avec les médias / Media relations  
Patrimoine canadien / Canadian Heritage  
819-953-7886 / 873-354-6451

----- Original message -----

**From:** "Bujold, Marthe (PCH)" <marthe.bujold@canada.ca>  
**Date:** 2019-11-08 6:32 PM (GMT-05:00)  
**To:** "Courage, Martine (PCH)" <martine.courage@canada.ca>  
**Cc:** "Mondou, Isabelle (PCH)" <isabelle.mondou@canada.ca>, "Collin, Dominique (PCH)" <dominique.collin@canada.ca>, "Média / Media (PCH)" <PCH.media-media.PCH@canada.ca>, "Marchand, Roxane (PCH)" <roxane.marchand@canada.ca>, "Laurendeau, Hélène (PCH)" <helene.laurendeau@canada.ca>, "Maury, Dominique (PCH)" <dominique.maury@canada.ca>, "Reinert, Chantal (PCH)" <chantal.reinert@canada.ca>, "Courville, Renée (PCH)" <renee.courville@canada.ca>, "Labelle, Nadine (PCH)" <nadine.labelle@canada.ca>, "McLeod, Isabelle (PCH)" <isabelle.mcleod@canada.ca>  
**Subject:** Re: For DMO approval: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Pas encore, Je vous laisserai savoir.  
Marthe

Sent from my iPhone

On Nov 8, 2019, at 5:30 PM, Courage, Martine (PCH) <[martine.courage@canada.ca](mailto:martine.courage@canada.ca)> wrote:

Merci bien! J'attends des nouvelles de Marthe.

Martine

---

**From:** Mondou, Isabelle (PCH) <[isabelle.mondou@canada.ca](mailto:isabelle.mondou@canada.ca)>  
**Sent:** Friday, November 8, 2019 5:29 PM  
**To:** Courage, Martine (PCH) <[martine.courage@canada.ca](mailto:martine.courage@canada.ca)>  
**Cc:** Collin, Dominique (PCH) <[dominique.collin@canada.ca](mailto:dominique.collin@canada.ca)>; Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>; Marchand, Roxane (PCH) <[roxane.marchand@canada.ca](mailto:roxane.marchand@canada.ca)>; Laurendeau, Hélène (PCH) <[helene.laurendeau@canada.ca](mailto:helene.laurendeau@canada.ca)>; Maury, Dominique (PCH)

<[dominique.maury@canada.ca](mailto:dominique.maury@canada.ca)>; Reinert, Chantal (PCH) <[chantal.reinert@canada.ca](mailto:chantal.reinert@canada.ca)>; Bujold, Marthe (PCH) <[marthe.bujold@canada.ca](mailto:marthe.bujold@canada.ca)>; Courville, Renée (PCH) <[renee.courville@canada.ca](mailto:renee.courville@canada.ca)>; Labelle, Nadine (PCH) <[nadine.labelle@canada.ca](mailto:nadine.labelle@canada.ca)>; McLeod, Isabelle (PCH) <[isabelle.mcleod@canada.ca](mailto:isabelle.mcleod@canada.ca)>  
**Subject:** RE: For DMO approval: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Il faudrait vérifier avec Marthe. Je ne suis pas certaine.

**Isabelle Mondou**

819-997-1356

---

**From:** Courage, Martine (PCH) <[martine.courage@canada.ca](mailto:martine.courage@canada.ca)>  
**Sent:** Friday, November 8, 2019 5:17 PM  
**To:** Mondou, Isabelle (PCH) <[isabelle.mondou@canada.ca](mailto:isabelle.mondou@canada.ca)>  
**Cc:** Collin, Dominique (PCH) <[dominique.collin@canada.ca](mailto:dominique.collin@canada.ca)>; Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>; Marchand, Roxane (PCH) <[roxane.marchand@canada.ca](mailto:roxane.marchand@canada.ca)>; Laurendeau, Hélène (PCH) <[helene.laurendeau@canada.ca](mailto:helene.laurendeau@canada.ca)>; Maury, Dominique (PCH) <[dominique.maury@canada.ca](mailto:dominique.maury@canada.ca)>; Reinert, Chantal (PCH) <[chantal.reinert@canada.ca](mailto:chantal.reinert@canada.ca)>; Bujold, Marthe (PCH) <[marthe.bujold@canada.ca](mailto:marthe.bujold@canada.ca)>; Courville, Renée (PCH) <[renee.courville@canada.ca](mailto:renee.courville@canada.ca)>; Labelle, Nadine (PCH) <[nadine.labelle@canada.ca](mailto:nadine.labelle@canada.ca)>; McLeod, Isabelle (PCH) <[isabelle.mcleod@canada.ca](mailto:isabelle.mcleod@canada.ca)>  
**Subject:** RE: For DMO approval: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Merci, Isabelle. Est-ce que votre réponse comprend l'appro de MINO ou on attend encore après ça?

Martine

---

**From:** Mondou, Isabelle (PCH) <[isabelle.mondou@canada.ca](mailto:isabelle.mondou@canada.ca)>  
**Sent:** Friday, November 8, 2019 5:14 PM  
**To:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>; Laurendeau, Hélène (PCH) <[helene.laurendeau@canada.ca](mailto:helene.laurendeau@canada.ca)>  
**Cc:** Collin, Dominique (PCH) <[dominique.collin@canada.ca](mailto:dominique.collin@canada.ca)>; Labonte, Natalie (PCH) <[natalie.labonte@canada.ca](mailto:natalie.labonte@canada.ca)>; Marchand, Roxane (PCH) <[roxane.marchand@canada.ca](mailto:roxane.marchand@canada.ca)>; Maury, Dominique (PCH) <[dominique.maury@canada.ca](mailto:dominique.maury@canada.ca)>; Reinert, Chantal (PCH) <[chantal.reinert@canada.ca](mailto:chantal.reinert@canada.ca)>; Bujold, Marthe (PCH) <[marthe.bujold@canada.ca](mailto:marthe.bujold@canada.ca)>; Courville, Renée (PCH) <[renee.courville@canada.ca](mailto:renee.courville@canada.ca)>; Labelle, Nadine (PCH) <[nadine.labelle@canada.ca](mailto:nadine.labelle@canada.ca)>; McLeod, Isabelle (PCH) <[isabelle.mcleod@canada.ca](mailto:isabelle.mcleod@canada.ca)>  
**Subject:** RE: For DMO approval: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Ok.

**Isabelle Mondou**

819-997-1356

---

**From:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>  
**Sent:** Friday, November 8, 2019 4:37 PM  
**To:** Laurendeau, Hélène (PCH) <[helene.laurendeau@canada.ca](mailto:helene.laurendeau@canada.ca)>  
**Cc:** Mondou, Isabelle (PCH) <[isabelle.mondou@canada.ca](mailto:isabelle.mondou@canada.ca)>; Collin, Dominique (PCH) <[dominique.collin@canada.ca](mailto:dominique.collin@canada.ca)>; Labonte, Natalie (PCH) <[natalie.labonte@canada.ca](mailto:natalie.labonte@canada.ca)>; Marchand, Roxane (PCH) <[roxane.marchand@canada.ca](mailto:roxane.marchand@canada.ca)>; Maury, Dominique (PCH) <[dominique.maury@canada.ca](mailto:dominique.maury@canada.ca)>; Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>; Reinert, Chantal (PCH) <[chantal.reinert@canada.ca](mailto:chantal.reinert@canada.ca)>; Bujold, Marthe (PCH) <[marthe.bujold@canada.ca](mailto:marthe.bujold@canada.ca)>; Courville, Renée (PCH) <[renee.courville@canada.ca](mailto:renee.courville@canada.ca)>; Labelle, Nadine (PCH)

<nadine.labelle@canada.ca>; McLeod, Isabelle (PCH) <isabelle.mcleod@canada.ca>

**Subject:** For DMO approval: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Pour approbation SVP, merci.

---

## **MEDIA**

**Murad Hemmadi**

**The Logic**

## **CONTEXT**

Reporter is writing about Canada-European Union Digital Dialogues. Specifically, a briefing note prepared for the deputy minister in July 2019 (obtained via ATIP; relevant sections attached) identifies a tentative timeline and work plan for the Dialogues.

It includes "Workshops on Audiovisual and Copyright Legislative and Regulatory Reform" in "Fall/Winter 2019" that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace."

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1. Did the workshops take place, or are they scheduled to take place in the future?
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3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?

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Officials also reflected on technological advancements that are emerging in the creative marketplace and on the potential uses of AI and blockchain technologies. Officials agreed to continue discussions and monitoring their respective markets.

**Deadline:**

**Journalist: ideally COB today (reporter requested end of day, Monday, Nov. 11 )**

## Courage, Martine (PCH)

---

**From:** Bujold, Marthe (PCH)  
**Sent:** Tuesday, November 12, 2019 8:53 AM  
**To:** Courage, Martine (PCH); Mondou, Isabelle (PCH); Média / Media (PCH)  
**Cc:** Collin, Dominique (PCH); Marchand, Roxane (PCH); Laurendeau, Hélène (PCH); Maury, Dominique (PCH); Reinert, Chantal (PCH); Courville, Renée (PCH); Labelle, Nadine (PCH); McLeod, Isabelle (PCH)  
**Subject:** RE: For DMO approval: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Approved.

Merci,

Marthe Bujold  
Chef de Cabinet | Chief of Staff  
Bureau de la Sous-Ministre | Deputy Minister's Office  
Patrimoine canadien | Canadian Heritage  
t.: 819-994-1900

---

**From:** Mondou, Isabelle (PCH) <[isabelle.mondou@canada.ca](mailto:isabelle.mondou@canada.ca)>  
**Sent:** Friday, November 8, 2019 5:14 PM  
**To:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>; Laurendeau, Hélène (PCH) <[helene.laurendeau@canada.ca](mailto:helene.laurendeau@canada.ca)>  
**Cc:** Collin, Dominique (PCH) <[dominique.collin@canada.ca](mailto:dominique.collin@canada.ca)>; Labonte, Natalie (PCH) <[natalie.labonte@canada.ca](mailto:natalie.labonte@canada.ca)>; Marchand, Roxane (PCH) <[roxane.marchand@canada.ca](mailto:roxane.marchand@canada.ca)>; Maury, Dominique (PCH) <[dominique.maury@canada.ca](mailto:dominique.maury@canada.ca)>; Reinert, Chantal (PCH) <[chantal.reinert@canada.ca](mailto:chantal.reinert@canada.ca)>; Bujold, Marthe (PCH) <[marthe.bujold@canada.ca](mailto:marthe.bujold@canada.ca)>; Courville, Renée (PCH) <[renee.courville@canada.ca](mailto:renee.courville@canada.ca)>; Labelle, Nadine (PCH) <[nadine.labelle@canada.ca](mailto:nadine.labelle@canada.ca)>; McLeod, Isabelle (PCH) <[isabelle.mcleod@canada.ca](mailto:isabelle.mcleod@canada.ca)>  
**Subject:** RE: For DMO approval: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Ok.

**Isabelle Mondou**  
819-997-1356

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**Subject:** For DMO approval: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Pour approbation SVP, merci.



---

## MEDIA

**Murad Hemmadi**

**The Logic**

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## QUESTION

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## Deadline:

Journalist: ideally COB today (reporter requested end of day, Monday, Nov. 11 )

## **Courage, Martine (PCH)**

---

**From:** Courage, Martine (PCH)  
**Sent:** Tuesday, November 12, 2019 10:03 AM  
**To:** 'Collins, Carlotta'  
**Subject:** For PCO info: APPEL MEDIA CALL: The Logic, Canadian-European Digital Dialogues

Hi Carlotta, here's a media request for your info. You said you didn't need to weigh in on this one. I'll send in 15 or 20 minutes.

Martine

---

### **MEDIA**

**Murad Hemmadi**  
**The Logic**

### **CONTEXT**

Reporter is writing about Canada-European Union Digital Dialogues. Specifically, a briefing note prepared for the deputy minister in July 2019 (obtained via ATIP; relevant sections attached) identifies a tentative timeline and work plan for the Dialogues.

It includes "Workshops on Audiovisual and Copyright Legislative and Regulatory Reform" in "Fall/Winter 2019" that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace."

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**Deadline:**

Journalist: ideally COB today (reporter requested end of day, Monday, Nov. 11 )

## **Courage, Martine (PCH)**

---

**From:** Média / Media (PCH)  
**Sent:** Tuesday, November 12, 2019 10:22 AM  
**To:** Murad Hemmadi  
**Subject:** RE: Media request, deadline 5 pm EDT Mon Nov 11

Good morning Murad,

The workshops on Audiovisual and Copyright Legislative and Regulatory Reforms took place October 17-18, 2019 at the European Commission in Brussels. The workshop on Countering Disinformation and Diversity of Content Online is scheduled to take place November 28-29, 2019 in Gatineau.

The workshops on Audiovisual and Copyright Legislative and Regulatory Reforms allowed Canadian and EU officials to exchange on their respective reviews on each matter. The EU provided an overview of their implementation of the revised Audiovisual Media Services Directive as well as their Copyright in the Digital Single Market Directive.

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Officials also reflected on technological advancements emerging in the creative marketplace and on the potential uses of AI and blockchain technologies. Officials agreed to continue discussions and monitoring their respective markets.

Regards,

Martine

---

**From:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Sent:** Friday, November 8, 2019 6:21 PM  
**To:** Murad Hemmadi <murad.hemmadi@thelogic.co>  
**Cc:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Subject:** RE: Media request, deadline 5 pm EDT Mon Nov 11

Hi Murad, we should be able to get you a response by Tuesday morning/before noon.

Martine

---

**From:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Sent:** Friday, November 8, 2019 10:18 AM  
**To:** Murad Hemmadi <murad.hemmadi@thelogic.co>  
**Cc:** Média / Media (PCH) <PCH.media-media.PCH@canada.ca>  
**Subject:** RE: Media request, deadline 5 pm EDT Mon Nov 11

Hi Murad, we've received your request and will start working on it. Given that Monday is a statutory holiday, I'm not sure we can meet your deadline, but I'll check and get back to you.

Martine Courage

Porte-parole, Services de relations avec les médias  
Patrimoine canadien, Gouvernement du Canada  
[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)  
Tél. : 819-994-9101 | sans frais 1-866-569-6155 (au Canada seulement)  
ATS (sans frais) : 1-888-997-3123

Spokesperson, Media Relations Services  
Canadian Heritage, Government of Canada  
[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)  
Tel: 819-994-9101 | toll free 1-866-569-6155 (in Canada only)  
ATS (toll free) : 1-888-997-3123

**From:** Murad Hemmadi <[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)>  
**Sent:** Friday, November 8, 2019 9:30 AM  
**To:** Média / Media (PCH) <[PCH.media-media.PCH@canada.ca](mailto:PCH.media-media.PCH@canada.ca)>  
**Subject:** Media request, deadline 5 pm EDT Mon Nov 11

Hi there,

My name is Murad Hemmadi and I'm a reporter at *The Logic*. I have a media request concerning the Canada-European Union Digital Dialogues. My deadline is 5 pm EDT on Monday November 11.

Specifically, a briefing note prepared for the deputy minister in July 2019 (obtained via ATIP; relevant sections attached) identifies a tentative timeline and work plan for the Dialogues. It includes "Workshops on Audiovisual and Copyright Legislative and Regulatory Reform" in "Fall/Winter 2019" that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace." The workshops were to be "focused discussion with working level officials and take place in Ottawa."

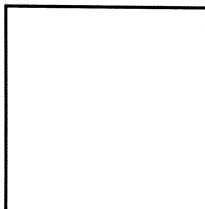
My questions are as follows:

1. Did the workshops take place, or are they scheduled to take place in the future?
2. What was the outcome of the workshops?
3. What specifically about the "use of AI and blockchain technology in the creative marketplace" was discussed?

Thanks  
Murad

Murad Hemmadi  
Reporter  
+1(647) 975-5090  
[murad.hemmadi@thelogic.co](mailto:murad.hemmadi@thelogic.co)  
[@muradhem](https://twitter.com/muradhem)  
[telegram.me/muradhem](https://t.me/muradhem)

Try us out! Get 50% off your first three months: [thelogic.co/subscription-promotion/](https://thelogic.co/subscription-promotion/)



## **Courage, Martine (PCH)**

---

**From:** Média / Media (PCH)  
**Sent:** Tuesday, November 12, 2019 4:35 PM  
**Subject:** ACTIVITÉS MÉDIATIQUES - MEDIA ACTIVITIES 12/11/2019

### **ACTIVITÉS MÉDIATIQUES - MEDIA ACTIVITIES 12/11/2019**

#### **EN ATTENTE / PENDING**

##### **Leah Sandals, Canadian Art magazine, Canadian Art magazine regarding cultural property exports**

Received: Tuesday, November 12, 3:30 p.m.

The CCPEIA states in section 15 that "The Minister may amend, suspend, cancel or reinstate any export permit, other than an export permit issued on the direction of the Review Board, and where an export permit is amended, suspended, cancelled or reinstated, the Minister shall forthwith send a written notice to that effect to the person who applied for the permit."

Q1. If the Minister is not planning to amend, suspend, cancel or reinstate the permit related to Emily Carr, Skedans, 1912, what criteria might, in alternative circumstances, compel the Minister to do so?

Q2. What details are available, if any, about the date that the relevant export permit (for Emily Carr, Skedans, 1912) was issued? (If this requires an ATIP request, feel free to ignore this question.)

Deadline: November 19, 5 p.m.

##### **Nigel Hunt, CBC, study on effects of foreign location services on domestic film and TV industry**

Received: Nov. 12, 1:06 pm

- 1) Please let me know when this report will be available.
- 2) Any chance to see advance information under embargo?
- 3) Who will be available to speak about it?

Deadline: Friday, November 15

#### **AVEC DG COMM / WITH DG COMM**

**NIL**

#### **AVEC CSM (PATRIMOINE | SPORT) / WITH DMO (HERITAGE | SPORT)**

**NIL**

#### **AVEC CSM (LANGUES OFFICIELLES) / WITH DMO (OFFICIAL LANGUAGES)**

**NIL**

## **AVEC LIAISON MINISTÉRIELLE (LO) / WITH MINISTERIAL LIAISON (OL)**

**NIL**

## **AVEC BCP / WITH PCO**

**NIL**

## **FERMÉ / CLOSED**

### **Michael Swan, The Catholic Register regarding the Indigenous Languages Act**

Received Wednesday, November 6 at 12:45 p.m.

Follow-up questions on Indigenous language preservation: I am surprised that nobody in the government isn't trying to figure out which languages will survive the next three or four generations. After all, if you've just passed an Indigenous Languages Act and it's the Year of Indigenous Languages and UNESCO is speculating that 40 per cent of the languages spoken now won't make it to the next century, surely somebody in government with a degree in linguistics or anthropology is trying to figure out which languages are most endangered? Doesn't somebody have a list from most endangered to least endangered?

The Department of Canadian Heritage contracted Mary Jane Norris of Norris Research Inc. (NRI) to conduct research on the characteristics of and state of Indigenous languages in communities across Canada. The research is based on Statistics Canada Census data starting in 2001 and other non-census sources such as the Ethnologue, UNESCO, the First Peoples' Cultural Council in British Columbia (FPCC), William Poser and Louis-Jean Dorais. Mary Jane Norris is a member of the Algonquins of Pikwakanagan First Nation in the Ottawa Valley.

Her findings reveal that all Indigenous languages in Canada have some level of endangerment. Her 2016 report can be found here: [https://norrisresearch.com/lang\\_rept/NRI\\_Rept\\_Mar2016.pdf](https://norrisresearch.com/lang_rept/NRI_Rept_Mar2016.pdf)

Canadian Heritage will continue to support efforts by First Nations, Métis and Inuit, and, once created, the Office of the Commissioner of Indigenous Languages, to understand the state of Indigenous languages in Canada.

Deadline: as soon as possible

### **Murad Hemmadi, The Logic, Canada-EU Digital Dialogues**

Received: Friday, Nov. 8, 10:30 am

Reporter's questions refer to a July 2019 briefing note for DM mentioning Workshops on Audiovisual and Copyright Legislative and Regulatory Reform in Fall/Winter 2019 that could include "[d]iscussion on the use of AI and blockchain technology in the creative marketplace.

1. Did the workshops take place, or are they scheduled to take place in the future?
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Deadline: the reporter requested Monday, Nov. 11, end of day



**Pages 97 to / à 99  
are under consultation  
sont sous consultation**

# Text and Data Mining Exception in Canada

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TINA MIRZAEI

CANADIAN HERITAGE

# Agenda

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- Terminology and Overview
- Technology
- Canadian *Copyright Act*
- Options
- International Perspective
- Final Recommendation

1. The purpose of this document is to provide a common understanding of the terminology used in the document.

2. The following definitions apply to the terms used in the document:

3. The following definitions apply to the terms used in the document:

4. The following definitions apply to the terms used in the document:

5. The following definitions apply to the terms used in the document:

6. The following definitions apply to the terms used in the document:

7. The following definitions apply to the terms used in the document:

8. The following definitions apply to the terms used in the document:

9. The following definitions apply to the terms used in the document:

10. The following definitions apply to the terms used in the document:

# Terminology

# Terminology

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**Artificial Intelligence:** Umbrella term in computer science which includes many different computational techniques including machine learning and knowledge discovery, and data mining.

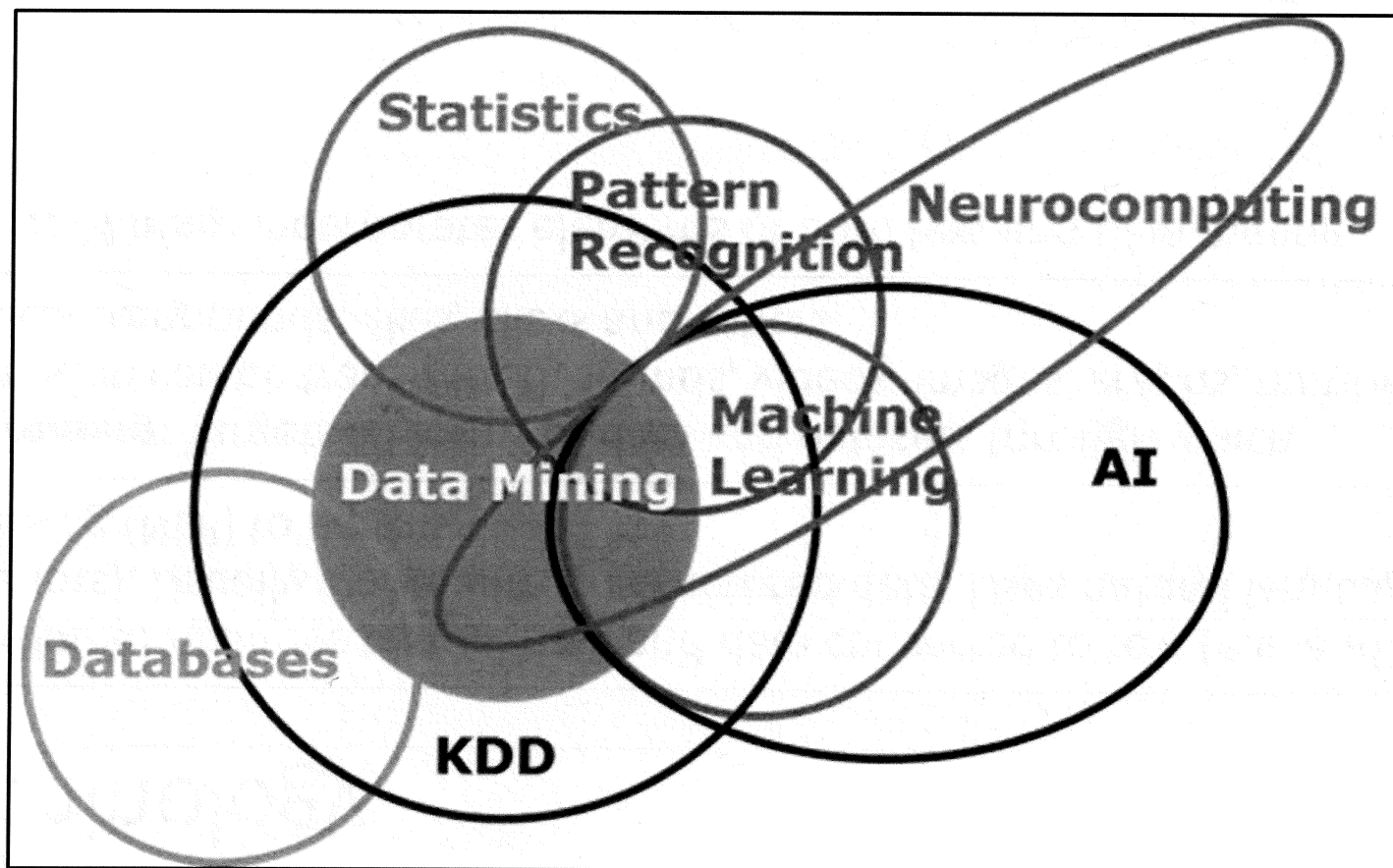
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**Machine Learning:** Teaching the AI without programming. Teaching through input of information and data, etc. Example: AlphaGo, Google AI.

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**Knowledge Discovery in Databases:** The overall process of discovering useful knowledge from data. Data mining refers to a particular step or subset in this process.

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Polly Mitchell-Guthrie, *Subconscious Musings* 2014

# Terminology

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**Text Mining:** Analyzes textual data and data converted to text (e.g. audio transcripts). Usually works with unstructured data. Uses natural language processing (NLP) to do this.

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**Data Mining:** Targets all forms of data and datasets through which information can be transmitted: sounds, videos, images, graphs, numbers, chemical compounds, likes, clicks and others.

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**Content Mining:** Incorporates elements of both text and data mining

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# Overview of the Landscape



## Big Data + Information Overload

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- The world generates about 2.5 quintillion bytes of data ***each day*** (2,500,000,000,000,000,000).

- User Generated Content: Tweets, Facebook posts, etc. (1.3 billion pieces of information and content per day)

- Digitization of traditional industries: journals, articles, datasets, cultural works, etc.

- Businesses collect trillions of bytes of information on customer transactions, suppliers, internal operations and competitors.

- Global research community generates 1.5 – 2.4 million new articles per annum

- Data predicted to increase at a rate of 40% per annum

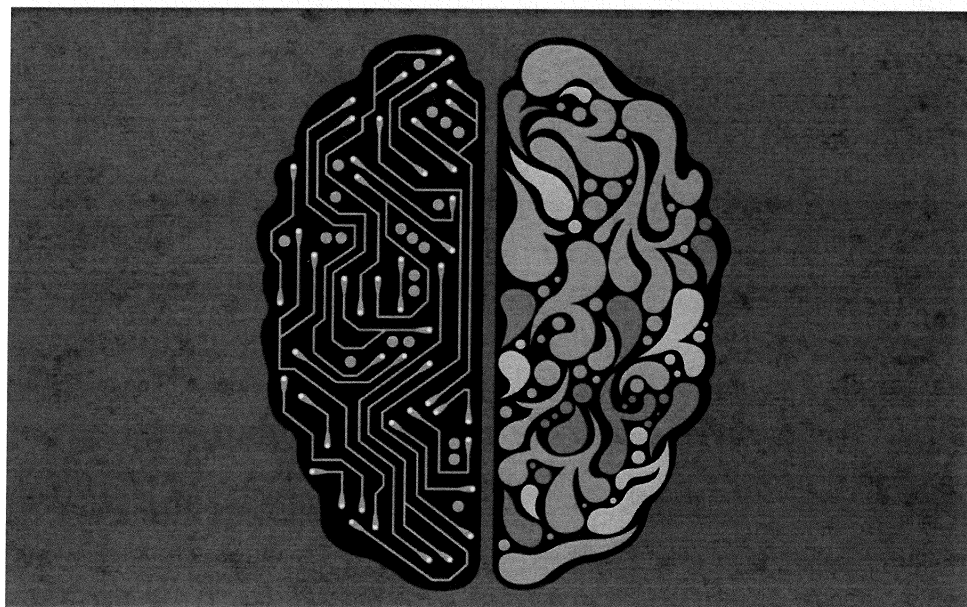
- Does **not** increase our ability to...

- Find the data we need

- Read the data we need

- Process the data we need

- Analyze the data we need



## What is Text and Data Mining (TDM)?

**“TDM is any automated analytical technique aiming to analyse text and data in digital form in order to generate information such as patterns, trends and correlations.” (European Commission)**

Automates a process that researchers have done manually for hundreds of years.

# Current Examples of TDM

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- Customer Data for Marketing
- Drug Discovery
- Legal Research
- Biomedical Sciences
- Chemical Reactions
- Sentiment Analysis
- If you have a question and the information exists for it, you can apply text and data mining

Insert Picture Here

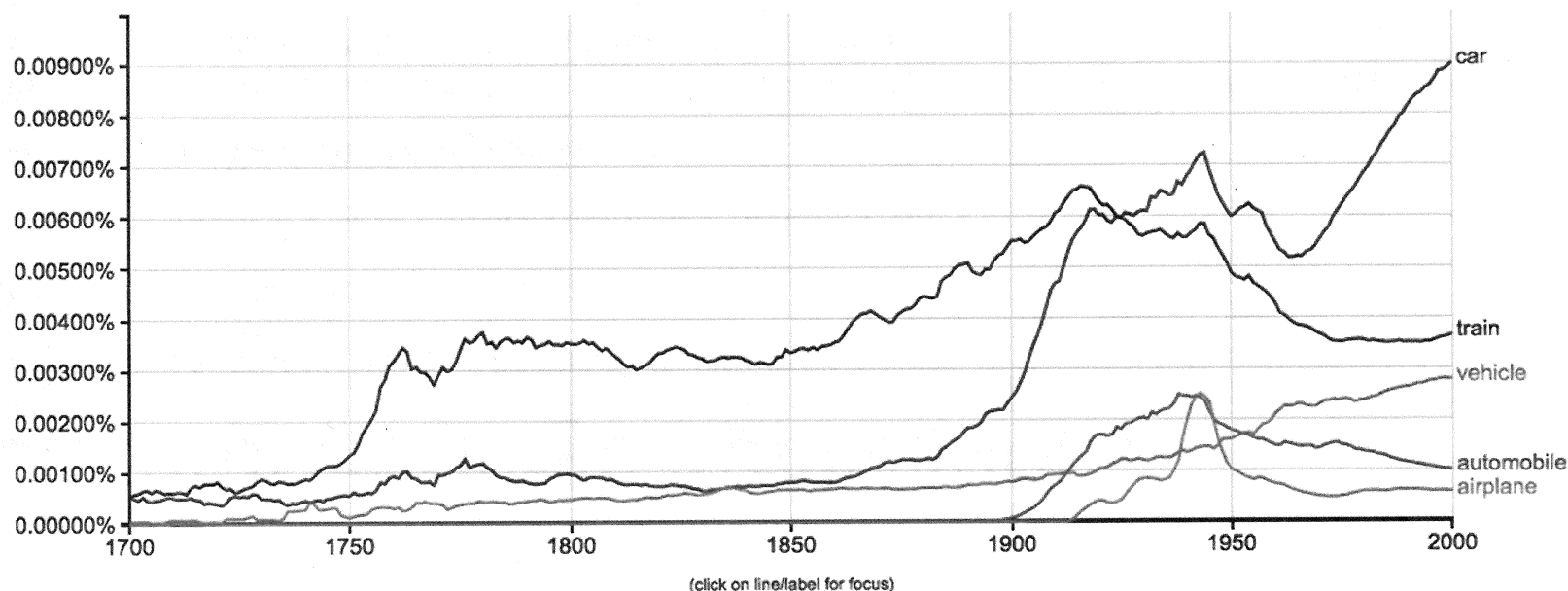
# Cultural Heritage Applications

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- “Digital Humanities”/“Cultural Analytics”/ “Culturomics”
- Digital Humanities: Social Sciences
- Cultural Analytics: Visual Culture (paintings, artifacts, etc.)
- Culturomics: Word and Language Usage
- Humanities/Cultural Works: Over the past 5-10 years there have been vast increases in the quantity of cultural heritage material due to digitization
- “Systematic use of **large-scale computational analysis and interactive visualization of cultural patterns** will become a major trend in cultural criticism and cultural industries in the coming decades.”
- Examples: Role of topography in war, influence of collaborations on jazz, concept tracking, gender roles in genre, etc.

## Examples of Culturomics: Google Ngram Viewer

- Millions of books from Google Books published between 1500-2009
- *Not* perfect (a lot of medical journals, a lot of duplicates) but it can be used for detecting cultural patterns in language use over time
- No effect on market of input
- <https://books.google.com/ngrams>



# Overall Benefits

Increase	Increase coverage of domain knowledge by a factor of 4
Identify	Identify relevant studies with only 25% of the usual manual work
Accelerate	Accelerate discovery, reducing the 10-12 year average timeframe from drug discovery to market
Identify	Identify the top papers among over a million publications per annum—can take 2-3 years
Innovate	Frees resources for innovation, Picks up on trends a manual researcher may have missed
Improve	Improve productivity in the curation of relevant literature by 50%

# Why It Matters

---

1

\$125 million to “position Canada as a world leading destination for companies seeking to invest in AI and innovation”

2

\$213 million investment in universities to become world-leading research center

3

Attract top talent and researchers; stimulate innovation, growth, and competitive advantage in the global market

# Copyright Issues

---

- TDM requires inputs (text, data, etc.)
- Inputs may be copied within that process
- **Issue:** TDM requiring copies = copyright infringement (even if you have *access* to the works)
- **Tension:** Legitimate interests of copyright owners vs copyright acting as a regulatory barrier to TDM and AI.  
Insert Picture Here
- Considerations:
  - Tragedy of the Anti-Commons
  - Disconnect between rights holders and user expectations in the digital world;
  - Balance between interests and objectives



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

# Technology

# TDM Process: Types of Data

Text Mining	Data Mining	Content Mining
<ul style="list-style-type: none"> <li>• Books</li> <li>• Newspaper articles</li> <li>• Web pages</li> <li>• Social media posts</li> <li>• Other natural language resources</li> </ul>	<ul style="list-style-type: none"> <li>• Sounds, videos, images, graphs, numbers, chemical compounds, likes, clicks, etc.</li> <li>• Datasets and databases</li> <li>• Archives</li> <li>• Graphs</li> <li>• Maps</li> <li>• Sequences</li> <li>• Formulas</li> </ul>	<ul style="list-style-type: none"> <li>• Incorporates elements of both text and data mining</li> <li>• Natural language text</li> <li>• Maps</li> <li>• Formulas</li> <li>• Graphs</li> <li>• Tables</li> <li>• Images</li> <li>• Metadata</li> </ul>

# Sources of Data

---

Self-Generated/Self-Created

Freely Available on the Web  
(all-to-all)

- No terms & conditions

Confidential (one-to-one)

Licences/Subscription (one-to-many)

- Publishers or repositories

Many-to-Many

- User generated, social networks
- Will depend on the terms and conditions of the social network and private account settings

Open Access, Creative Commons, Public Domain

# Contract Law and Privacy Law

---

- Many-to-Many (Social Networks)
- One-to-Many (Licences)
- One-to-One (Confidential)
- Access to such data are initially subject to **contractual clauses** and as a second layer to **intellectual property laws for the remainder**.
  - How do these 2 layers interact? Which supersedes the other?
- Depending on the source and type of information as well as the use, they may also be subject to privacy laws

# TDM Process: ETL

---



1. Individual content is **extracted** from outside sources (or sometimes **created**)
2. When necessary that content is **transformed** to fit operational needs
3. Content is **loaded** into a data set, repository or collection
4. Data miners gain access to the data and the mining (**analysis**) tools are applied to the data set
5. New knowledge is created as a result of the analysis (usually a **report** can be drafted)

# Why not...

---

...Use CC/OA/PD

- Patchy Availability
- Bias
  - Public Domain Works: Reflects works by more affluent. Less representation of women, minorities, LGBTQ community. Does not reflect current linguistics, current sentiment, etc.
  - Creative Commons: Editorship gender gap.

# Application to the Canadian Copyright Landscape

# TDM Process: Types of Data

Text Mining	Data Mining	Content Mining
<ul style="list-style-type: none"> <li>• Books</li> <li>• Newspaper articles</li> <li>• Web pages</li> <li>• Social media posts</li> <li>• Other natural language resources</li> </ul>	<ul style="list-style-type: none"> <li>• Sounds, videos, images, graphs, numbers, chemical compounds, likes, clicks, etc.</li> <li>• Datasets and databases</li> <li>• Archives</li> <li>• Graphs</li> <li>• Maps</li> <li>• Sequences</li> <li>• Formulas</li> </ul>	<ul style="list-style-type: none"> <li>• Incorporates elements of both text and data mining</li> <li>• Natural language text</li> <li>• Maps</li> <li>• Formulas</li> <li>• Graphs</li> <li>• Tables</li> <li>• Images</li> <li>• Metadata</li> </ul>



# Canadian Copyright Act

---

**3 (1)** For the purposes of this Act, **copyright**, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

- (a) to produce, reproduce, perform or publish any translation of the work,

and to authorize any such acts.

-AND-

**15 (1.1)** Subject to subsections (2.1) and (2.2), a performer's copyright in the performer's performance consists of the sole right to do the following acts in relation to the performer's performance or any substantial part of it and to authorize any of those acts:

- (b) if it is fixed in a sound recording, to reproduce that fixation;

# Exceptions: Fair Dealing

---

**(29)** Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

- **CCH Fair Dealing Factors:**

- 1. The purpose of the dealing**

- 2. The character of the dealing**

- Note: under US Fair Use these would be considered as "transformative" for most TDM cases

- 3. The amount of the dealing**

- 4. The alternatives to the dealing**

- 5. The nature of the work**

- 6. The effect of the dealing on the work**

- Should not effect the market of the work

- **Defence**

- **Contextual**

# Exceptions: Temporary Reproductions

---

**30.71** It is not an infringement of copyright to make a reproduction of a work or other subject-matter if

- (a)** the reproduction forms an essential part of a technological process;
  - (b)** the reproduction's only purpose is to facilitate a use that is not an infringement of copyright; and
  - (c)** the reproduction exists only for the duration of the technological process.
- Law dictating technological choices and processes

# Sources of Uncertainty

---

- Sometimes protected data, sometimes not
- Sometimes protected data is copied, sometimes not
- Sometimes copying is substantial, sometimes not
- Sometimes temporary copy, sometimes not
- Sometimes fair dealing, sometimes not
- “This legal uncertainty...will prevent stakeholders from investing in new promising European companies dealing with TDM in a range of emerging fields such as big data, artificial intelligence, machine learning, robotics and others.”

# Options



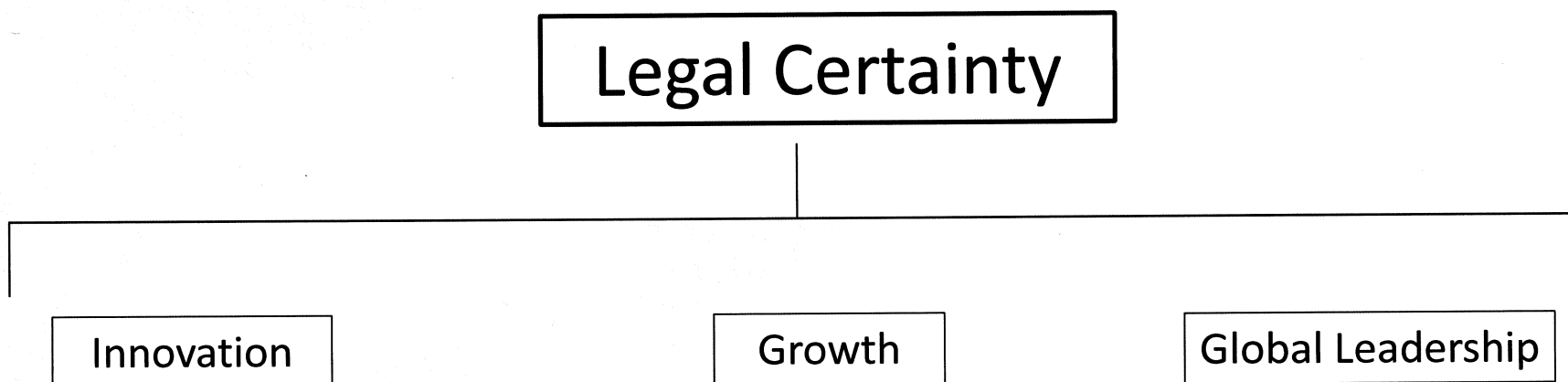
Self-Regulation

Fair Use

Exception

# Evaluation of Options

---



# Licensing: Publishers

---

- Collective Management/Direct From Publishers
  - The right to access and the right to mine are different rights
  - Significant investment in validation, correction and refinements to content
  - Investment in systems to hold that content securely
- Many publishers offer licences and APIs: Elsevier, British Medical Journal, Adam Matthew Digital, Factiva, Gale, IEEE Xplore, IOP Science, JSTOR, Oxford University Press, ProQuest, Royal Society, Springer, Wiley
  - Helps them manage traffic on their website
  - Protects their revenue streams
  - Non-Commercial Use

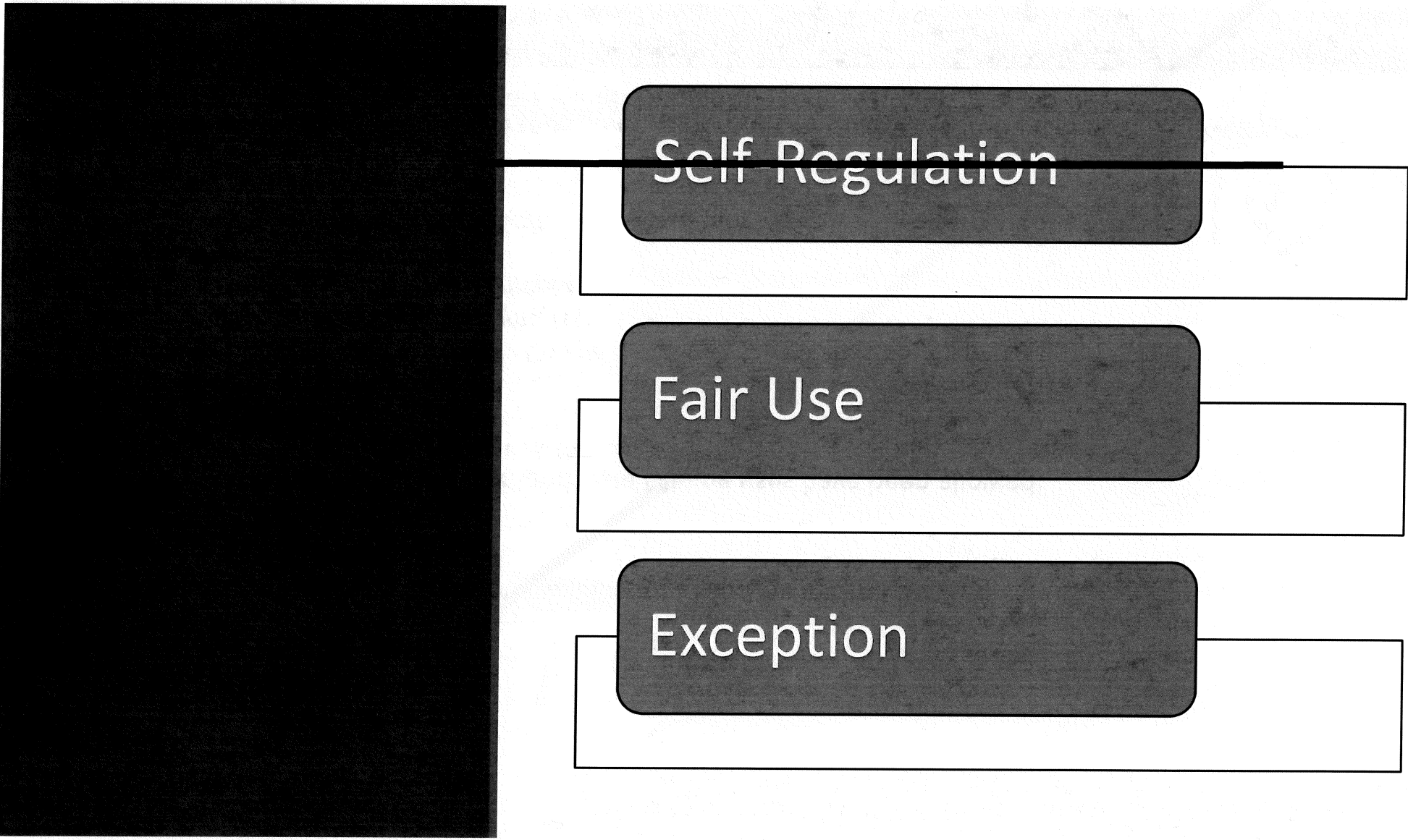


# Licensing: Researchers

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- The right to read is the right to mine
  - High Transaction Costs
  - Inefficient, costly and cannot scale
- Uneven levels of access; scalability
- Different Demands between Researchers
- APIs may limit access
- Legal Uncertainty:
  - Licenses for Commercial uses
  - Orphan Works
  - Other data on web where licences are not available

21 (1) (a)



Self Regulation

Fair Use

Exception

# Fair Use

---

- Change Fair Dealing to something Closer to Fair Use in the US
  - Open-ended list of purposes
  - Closed set of factors
- In the US under Fair Use, Text and Data Mining uses have been allowed:
  - *Authors Guild v HathiTrust*
  - *White v West*
  - *Fox v TVEyes*
  - *Authors Guild v Google*
  - *A.V. v iParadigms, LLC*
  - *Perfect 10 v Amazon*
  - *Field v Google*
  - *Kelly v Arriba Soft*
- Defence
- Case-by-case analysis, would require development through jurisprudence: doesn't give us the certainty we need and facilitate AI development and investment

21(1)(g)

Self Regulation

Fair Use

Exception

# Exception

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Limitations?

Social Good or Public Interest?

Scientific Research Only?

Commercial or Non-Commercial Use?

Limitations by Process?

What other countries  
are doing

# Japan

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## Reproduction, etc. for information analysis

**Article 47septies. For the purpose of information analysis** ("information analysis" means to extract information, concerned with languages, sounds, images or other elements constituting such information, from many works or other much information, and to make a comparison, a classification or other statistical analysis of such information; the same shall apply hereinafter in this Article) **by using a computer, it shall be permissible to make recording on a memory, or to make adaptation** (including a recording of a derivative work created by such adaptation), **of a work, to the extent deemed necessary. However, an exception is made of database works which are made for the use by a person who makes an information analysis.**



# France

## Article 38 En savoir plus sur cet article...

Le code de la propriété intellectuelle est ainsi modifié :

**1°** Après le second alinéa du 9° de l'article L. 122-5, il est inséré un 10° ainsi rédigé :

« 10° Les copies ou reproductions numériques réalisées à partir d'une source licite, en vue de l'exploration de textes et de données incluses ou associées aux écrits scientifiques pour les besoins de la recherche publique, à l'exclusion de toute finalité commerciale. Un décret fixe les conditions dans lesquelles l'exploration des textes et des données est mise en œuvre, ainsi que les modalités de conservation et de communication des fichiers produits au terme des activités de recherche pour lesquelles elles ont été produites ; ces fichiers constituent des données de la recherche ; »

**2°** Après le 4° de l'article L. 342-3, il est inséré un 5° ainsi rédigé :

« 5° Les copies ou reproductions numériques de la base réalisées par une personne qui y a licitement accès, en vue de fouilles de textes et de données incluses ou associées aux écrits scientifiques dans un cadre de recherche, à l'exclusion de toute finalité commerciale. La conservation et la communication des copies techniques issues des traitements, au terme des activités de recherche pour lesquelles elles ont été produites, sont assurées par des organismes désignés par décret. Les autres copies ou reproductions sont détruites. »

- Limited in terms of the research purpose (any **commercial** purpose is excluded)

- Limited in terms of the sector performing the research (only 'for the needs **public** research'),

- Limited in the subject matter to be mined (any kind of text, but only data 'including or associated with **scientific writings**')  
• Control and Supervision



# UK

---

- “Government should introduce a UK exception in the interim under the non-commercial research heading to allow use of analytics for non-commercial use...**as well as promoting at EU level an exception to support text mining and data analytics for commercial use.**”

# UK

## 29A Copies for text and data analysis for non-commercial research

(1) The making of a copy of a work by a person who has lawful access to the work does not infringe copyright in the work provided that—

(a) the copy is made in order that a person who has lawful access to the work may carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose, and

(b) the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

(2) Where a copy of a work has been made under this section, copyright in the work is infringed if—

(a) the copy is transferred to any other person, except where the transfer is authorised by the copyright owner, or

(b) the copy is used for any purpose other than that mentioned in subsection (1)(a), except where the use is authorised by the copyright owner.

(3) If a copy made under this section is subsequently dealt with—

(a) it is to be treated as an infringing copy for the purposes of that dealing, and

(b) if that dealing infringes copyright, it is to be treated as an infringing copy for all subsequent purposes.

(4) In subsection (3) “dealt with” means sold or let for hire, or offered or exposed for sale or hire.

(5) To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.

# EU Impact Assessment

---

- 4 options assessed basis of: effectiveness, efficiency, impact on stakeholders, and social impact
- Option 1: Fostering industry self-regulation initiatives without changes to the EU legal framework
- Option 2: Mandatory exception covering text and data mining for non-commercial scientific research
- **Option 3: Mandatory exception applicable to public interest research organizations covering text and data mining for the purposes of both non-commercial and commercial scientific research**
- Option 4: Mandatory exception applicable to anybody who has lawful access (including both public interest research organisations and businesses) covering text and data mining for any scientific research purposes.

# Issues

---

- Scientific Research Only:
  - What about cultural heritage applications?
  - How do you define “scientific research”
- Non-Commercial Research Only:
  - Removes incentive to invest from private sector (more resources)
  - How do you define “non-commercial”—New norm: partnerships with private sector with greater access to resources
- Public Interest:
  - How do you define what is in the “public interest” —A.V. v. Paradigms
- Conclusion: All of these factors contribute to uncertainty
- “We see enormous commercial potential in text mining, and especially in allowing third-party developers to build text mining tools on top of Mendeley’s infrastructure and data. ***Due to the uncertainties with UK legislation, we are currently exploring opportunities for setting up text mining projects through our US subsidiary, on US-based cloud computing infrastructure.*** However, since most of our team and infrastructure is based in the UK, this introduces delays and overhead cost, and will potentially lead to Mendeley creating future jobs in the US rather than the UK.”

# Final Recommendation

# Recommendations

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- TDM Exception
- Both Commercial and Non-Commercial
- Without emphasis on type of research or public interest
- In order to Promote:
  - Innovation
  - Growth
  - Investment
- And turn Canada into a “hotbed” for AI and a Global leader in Research

# Risks

---

- Does not address TPMs
  - Circumventing TPM = Infringement, without defence
- May be too broad; unintended consequences
  - At least for cases where there may be an effect on the market of data, can frame the exception to say that no substantial copy of the work may be created in the *output*
- Does not allow publishers to commercialize mining licences; Value-added: APIs
  - Can increase cost of access licences; reduces transaction costs
- High compliance costs for publishers who may need to renegotiate a significant number of business agreements their commercial customers
  - Transition period
- Contractual clauses
- Remnant risks of uncertainty

Final Notes



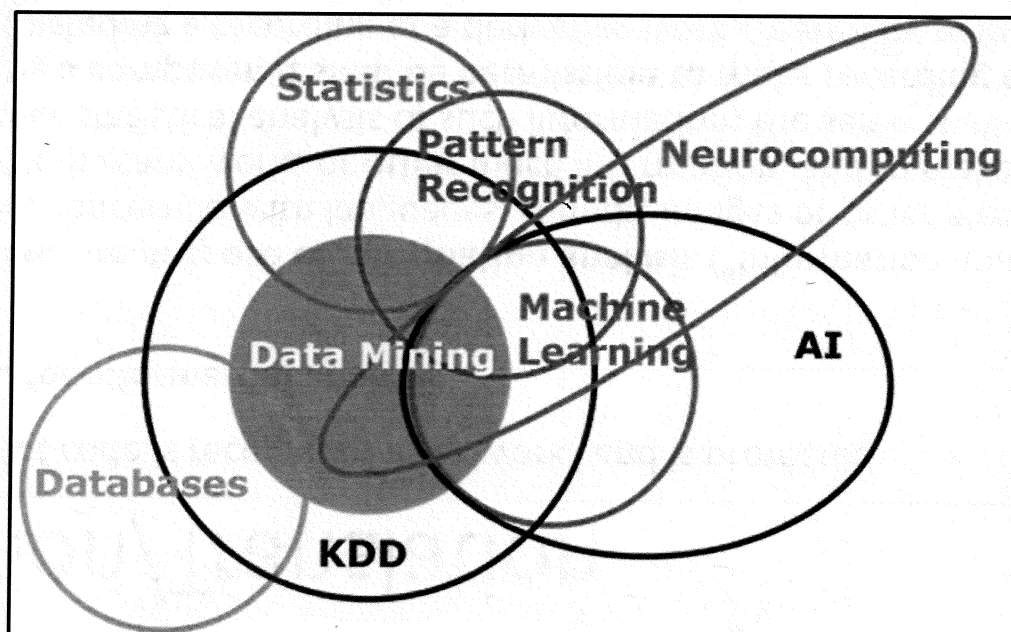
# Enables, Does Not Ensure

---

- Other resources necessary:
  - Funds
  - People with right skills and expertise
  - Knowledge and training

# Machine Learning

Recall:



Polly Mitchell-Guthrie, *Subconscious Musings* 2014

# Adaptation/Translation

---

- Under *Copyright Act* code is recognized as a “work” and is protected

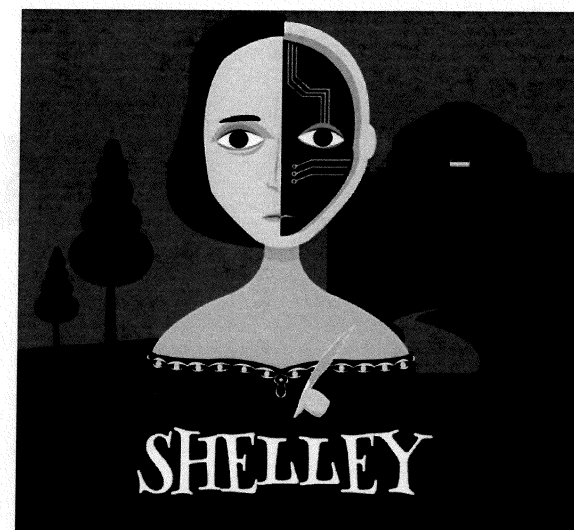
## **Reproduction, etc. for information analysis**

**Article 47septies.** For the purpose of information analysis ("information analysis" means to extract information, concerned with languages, sounds, images or other elements constituting such information, from many works or other much information, and to make a comparison, a classification or other statistical analysis of such information; the same shall apply hereinafter in this Article) **by using a computer, it shall be permissible to make recording on a memory, or to make adaptation** (including a recording of a derivative work created by such adaptation), **of a work, to the extent deemed necessary. However, an exception is made of database works which are made for the use by a person who makes an information analysis.**

# AI Generated Works/TDM Outputs

---

- How do the reports generated by TDM reports impact owner's interests
  - Recall: In *some* cases there are copies or summaries of original data input in the final report (not often)
- What about AI Generated Works?
- "TDM is any automated analytical technique aiming to analyse text and data in digital form in order to generate information such as patterns, trends and correlations."
  - Shelley
    - Works that have not existed in the horror genre before
  - 7<sup>th</sup> Game of Thrones Book
    - Combination of Machine Learning and TDM
    - Highlights User Expectations in Digital World



# Questions?

# Does the Canadian Copyright Act Need a Text and Data Mining Exception?

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December 2017

Intellectual property law and  
technology intensive program  
LW7410.03

Professor: Giuseppina D'Agostino

Word Count:  
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Total (no footnotes): 9,028

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## **INTRODUCTION**

It is now an almost impossible task for human researchers to analyse all the available information on a topic and make meaningful deductions. In fact, it is almost impossible to even *read* all the relevant materials on a single topic. Text and data mining (TDM) is a series of computational processes designed to aid humans in this endeavour. It can read and process data quickly, and efficiently, and make previously undetectable deductions, leaving researchers free to concentrate on more value-added tasks, such as innovation. TDM is also a critical component of Artificial Intelligence (AI) development as the concept of AI, machine learning and TDM are interwoven and interrelated. Achieving research excellence and becoming a center for developments in AI and digital technologies are critical components to Canada's future plans of stimulating growth and innovation in the country. TDM is therefore imperative to these goals.

What can be the problem with these developments? Copyright, for one. Frequently, the text and data analyzed in the mining process are copyright-protected materials. A substantial copy made by anyone who is not the owner, or has not been authorized by the owner, would constitute infringement according to s. 3 of the Canadian *Copyright Act* (the Act) and is therefore prohibited. A conflict emerges: to protect owners' interests, copyright law acts as a regulatory barrier to TDM.

My paper represents an analysis of the options available to resolve this conflict. One option is to make no changes to our copyright legal framework and allow the industry to self-regulate through private negotiations and the use of licences. The next option is to alter our fair dealing provision to more closely track the fair use provision in the U.S. as its open list of allowable purposes may be better able to support TDM. The final option is to include a specific exception for TDM in the Act, calibrated to achieve our desired objectives. In this paper, I will make an argument in favour of adopting the final option.

In Part I of this paper I will provide an overview of the TDM landscape: the digital reality that makes TDM necessary, a brief explanation of what TDM is, its applications and uses, and how it relates to AI, and finally, why it is critical to Canada's future. In Part II, I will outline the main issues of copyright infringement and certain considerations that should be kept in mind, such as "tragedy of the anti-commons" and user expectations in the digital world.

I will go through a detailed analysis of the technological aspects of TDM in Part III. In Part IV I will overview the relevant provisions in the *Copyright Act*, including s. 3 for copyright infringement, but also any applicable exceptions that might grant relief, such as fair dealing (s. 29) or temporary reproductions in a technological process (s. 30.71). I will argue that while the exceptions may apply to some TDM scenarios, they do not provide certain results and as such are suboptimal for serving Canada's goals of becoming a global center for AI development and research.

In Part V, I will analyze the three options for resolving this issue (self-regulation, fair use, and an exception). I conclude that a TDM exception will be best suited for our needs; to establish how to calibrate the exception, I will review the exceptions that exist in other jurisdictions and assess their implications. Finally, in Part VI, I will make my final recommendation along with some commentaries with the recommendation (specifically, any issues with the recommendation), I then outline a few further considerations that fall outside the scope of this study but which may be relevant for drafting an exception, before closing with my final conclusion.

## **PART I: AN OVERVIEW OF THE TDM LANDSCAPE**

Analyzing text or data to generate new knowledge and insights is not a novel concept; we have been conducting such analysis manually for hundreds of years. Text, data, and content mining are all examples of the automation of such analyses. In this section, I will discuss why manual research is becoming untenable and why knowledge discovery, like TDM, has become necessary. I will review some applications and benefits of TDM, as well as how TDM fits into the AI structure. Finally, I will discuss why TDM is so vital to Canada's future.

### **Big Data and Our New Digital Reality**

Over the past decade, the volume of text and data available for analysis has increased exponentially. It is estimated that 50 million scholarly articles exist globally, and that the world generates approximately 2.5 quintillion bytes of data each day.<sup>1</sup> In humanities and cultural works, large-scale digitization projects have massively increased the quantity of cultural heritage material available for processing.<sup>2</sup> In scientific research, more than 2.4 million scientific articles are published every year.<sup>3</sup> This “sea” of data is expected to increase at a rate of 40 percent per annum.<sup>4</sup> Big data, a term applied to data sets “whose size or type is beyond the ability of traditional

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<sup>1</sup> Arif, E. Jinha, “Article Fifty Million: An Estimate of the Number of Scholarly Articles in Existence” (2010) 23: 3 Learned Publishing 258, Online: <<http://onlinelibrary.wiley.com/doi/10.1087/20100308/epdf>>; George S Takach, “The Dough is in the Data” (13 September 2017), *Lexpert Magazine*, online: <<http://www.lexpert.ca/article/the-dough-is-in-the-data/>>. (Takach)

<sup>2</sup> David Mimno, “Computational Historiography: Data Mining in a Century of Classics Journals” Vol. 2 ACM Transactions on Computational Logic 1 at 1, Online: <<http://www.perseus.tufts.edu/~amahoney/02-jocch-mimno.pdf>>.

<sup>3</sup> Rob Johnson, Olga Fernholz, & Mattia Fosci, “Text and Data Mining in Higher Education and Public Research” (2016) ABDU 1 at 13, Online: <<https://adbu.fr/competplug/uploads/2016/12/TDM-in-Public-Research-Final-Report-11-Dec-16.pdf>>. (Johnson)

<sup>4</sup> Diane McDonald & Ursula Kelly. “The Value and Benefits of Text Mining” (2013) JISC at 3, online: <<https://www.webarchive.org.uk/wayback/archive/20140614042724/http://www.jisc.ac.uk/sites/default/files/value-text-mining.pdf>>. (McDonald & Kelly)

relational databases to capture, manage, and process [the data] with low-latency”<sup>5</sup> is a new tenant of our reality.

If we were able to exploit all this new data and leverage it to extract new insights and knowledge, it would mean significant potential economic and societal value, including enhancements in productivity, and competitiveness.<sup>6</sup> It is not sufficient, however, for the data to simply exist; the data must be processed, connected, analyzed. Whereas before researchers were able to comb through a small number of high-value texts, it is now almost impossible for humans to sift through the available information without some automated help. If not impossible, then inefficient, costly, and impractical. As such, “any fundamental advances must come from the fact that this material is now available for computational processing.”<sup>7</sup> This is where knowledge discovery becomes relevant.

## **Knowledge Discovery and Text and Data Mining**

“Knowledge Discovery in Databases” (KDD) is the process of discovering useful knowledge from data.<sup>8</sup> Data mining is a step, or a subset, within KDD. “Text and data mining” refers to a series of computer science techniques and processes applied to large sets of digital data to analyze and extract knowledge and new information.<sup>9</sup> One of the main benefits of TDM can be summarized as: “On one hand, text mining enables researchers to read less. On the other hand, text

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<sup>5</sup> IBM Analytics, “Big Data Analytics” Website; Online: <<https://www.ibm.com/analytics/hadoop/big-data-analytics>>.

<sup>6</sup> McDonald & Kelly, *Supra* note 4 at 3 and 7.

<sup>7</sup> Mimno, *Supra* note 2 at 1.

<sup>8</sup> Usama Fayyad, Gregory Piatetsky-Shapiro & Padhraic Smyth, “From Data Mining to Knowledge Discovery in Databases” (1996) 17: 3 AI Magazine at 37, Online: <<https://www.aaai.org/ojs/index.php/aimagazine/article/viewFile/1230/1131>>.

<sup>9</sup> OECD, “Data-Driven Innovation: Big Data for Growth and Well-Being,” (2015) OECD Publishing at 301, Online: <[http://www.keepeek.com/Digital-Asset-Management/oecd/science-and-technology/data-driven-innovation\\_9789264229358-en#.WiVhABgZPBI#page3](http://www.keepeek.com/Digital-Asset-Management/oecd/science-and-technology/data-driven-innovation_9789264229358-en#.WiVhABgZPBI#page3)>.

mining enables researchers to read more relevant things.”<sup>10</sup> The new information that TDM generates may manifest itself as patterns, trends, correlations, and other new insights, such as connections between data that were not discernable before.

TDM is not applied blindly. It is applied to a corpus of data to achieve a specific objective and answer a specific question, for example: what emerges when all the texts in a corpus are cross-referenced? or what recurring theme runs across these data?<sup>11</sup>

In short, TDM allows us to exploit and unlock the potential in all of the new data, and thereby develop new knowledge, which can help us with innovation. While this paper refers to all types of “mining” activities as TDM, to avoid confusion, it is worth noting their differences:

- Text Mining: Analyses textual data (transcripts, web pages, social media posts). This requires a technique referred to as “Natural Language Processing” (NLP) that uses algorithms to analyze “natural” (human) language.
- Data Mining: Analyses “all forms through which information can be transmitted”<sup>12</sup> (sounds, graphs, maps, databases, archives, formulas). It does not typically rely on process such as NLP.
- Content Mining: Represents a combination of “text” and “data” mining

## Uses and Applications

There are many uses for TDM; it has been applied widely and in a number of contexts, such as researching causes and treatments of Alzheimer’s disease, and investigating climate change.<sup>13</sup> It has also been used by government and public authorities to aid in counter-terrorism and crime prevention.<sup>14</sup> It serves as the underlying technology behind Internet search engines, targeted advertising, and direct marketing. It can be used for sentiment analysis, which means

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<sup>10</sup> Steve Hardin, “Text and Data Mining Meets the Pharmaceutical Industry” (2017) 43:3 Ass’n for Info Sci & Tech 42 at abstract, Online: < <http://onlinelibrary.wiley.com/doi/10.1002/bul2.2017.1720430314/full>>.

<sup>11</sup> CNRS, “Open Science in a Digital Republic – Strategic Guide: What is Text and Data Mining?” (2017) OpenEdition Press, Online: < <http://bookstore.openedition.org/fr/ebook/9782821878433>>.

<sup>13</sup> Johnson, *Supra* note 3 at 14; McDonald & Kelly *Supra* note 4 at 9.

<sup>14</sup> Johson, *Supra* note 3 at 15.

deriving subjective information, like sentiment, from source materials, such as tweets. It can be used in biomedical, biological, and chemical research and for drug discovery in pharmaceuticals. Banking and finance; insurance and health; law and humanities.

In the field of social sciences and cultural industries, new insights have been gleaned as a result of applying computational analysis techniques, like TDM, to the newly available digitized data in history, humanities, and cultural works. Examples include: digitally mapping Civil War battlefields to understand what role topography played in victory, using databases of thousands of jam sessions to track how musical collaborations influenced jazz, searching through large numbers of texts to track where concepts first appeared and how they spread (“culturomics”), and applying computational analysis to the study of culture (“cultural analytics”) and helping to answer questions like “why literature matters”, “what we Instagram”, and “how did human societies evolve?”<sup>15</sup>

A popular example of TDM is the Google N-Gram Viewer. Google scientists created the N-Gram Viewer using a corpus of 5.2 million books published between 1500 – 2009. Using that corpus of data, it can track the frequency of the use of words and phrases over time.<sup>16</sup> It is not a perfect mechanism for research and results will have to be carefully analyzed and interpreted. Nevertheless, it can be a useful tool to direct research and provide meaningful insight.

It is important to note that TDM processes always result in the generation of new content. The inputs are not reproduced or replicated or even summarized in the final result of TDM

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<sup>15</sup> See: Culturomics, Online: <<http://www.culturomics.org>>; Andrew Piper, *Fictionality*, (20 December 2016) Cultural Analytics, Online: <<http://culturalanalytics.org/2016/12/fictionality/>>; Yuheng Hu, *What We Instagram: A First Analysis of Instagram Photo Content and User Types* Depart of Comp Sci: Arizon St U, Online: <<http://rakaposhi.eas.asu.edu/instagram-icwsm.pdf>> (selfies, friends, fashion, food, gadget, activity, pets, and captioned photos); *Supra* Note 60 Cohen; Peter Turchin et al, *War, Space and the Evolution of the Old World Complex Societies* (27 August 2013), Online: <[http://peterturchin.com/PDF/Turchin\\_etal\\_PNAS2013.pdf](http://peterturchin.com/PDF/Turchin_etal_PNAS2013.pdf)>.

<sup>16</sup> Culturomics, “The Google N-Gram Viewer” Website, Online: <<http://www.culturomics.org/Resources/A-users-guide-to-culturomics>>.

processes. Consider the N-Gram Viewer: the final program that the scientists created helps gain new insights through the use of millions of books, and yet that insight is reported in n-grams. No text or snippet of any book is reproduced; their market is not compromised.

## **Benefits**

TDM technologies can generate significant economic and societal value, including: “increased researcher efficiency; unlocking hidden information and developing new knowledge; exploring new horizons; improved research and evidence base; and improving the research process and quality.”<sup>17</sup> Other benefits include cost savings, especially in the research process. Identifying relevant literature and studies for a research project can be reduced to 25 percent of the manual work.<sup>18</sup> Using advanced TDM tools can reduce this to even lower levels.<sup>19</sup> The reduction in manual work will lead to significant savings in time and money. Other benefits include productivity gains, new medical treatments and discovery of drugs, and the development of innovative new services and business models.

One major benefit to TDM is innovation. Text mining is in itself an innovative process and it has the potential to deliver significant productivity gains, especially when conducting research.<sup>20</sup> Not only is it possible to unlock new knowledge, by mining more data, faster, and across multiple disciplines, essential resources are now freed so that the new insights generated by TDM processes can be applied to other value-added areas, such as R&D and business and product innovation.

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<sup>17</sup> McDonald & Kelly, *Supra* note 4 at 4.

<sup>18</sup> Johnson, *Supra* note 3 at 17.

<sup>19</sup> *Ibid.*

<sup>20</sup> McDonald & Kelly, *Supra* note 4 at 37.

## The Relationship Between AI and TDM

TDM is often incorrectly conflated and confused with artificial intelligence (AI). In fact, they are distinct, although often overlapping, concepts.

AI is an umbrella term. It encompasses many different computational techniques that simulate intelligence in order to solve complex problems and perform tasks previously performed by humans.<sup>21</sup> One of these techniques is KDD, “machine learning” another.

Machine learning involves teaching a machine without programming it; instead, it is programmed to learn by itself. Google taught its AI to become more conversational by having it read thousands of romance novels.<sup>22</sup> AlphaGo became the first machine to defeat a human Go player after learning how to adapt its corpus of 30 million moves by playing thousands of games.<sup>23</sup> The machine evolves because it learns to recognize patterns and make intelligent decisions based on the empirical data it gathers; when confronted with new data, the machine adapts based on past experience.

TDM, AI, and Machine learning have symbiotic and interwoven relationships: The insights, patterns, and relationships that TDM identifies can be used as a basis for both AI and machine learning. Conversely, machine learning can be used to aid in data mining by helping it adapt, recognize complex patterns, and improve its results. NLP, an important component of text

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<sup>21</sup> Camille Aubin & Justin Freedin, “A Landscape of Artificial Intelligence in Canada” (2017) *ROBIC 1982* (Newsletter), Online: <<https://www.robic.ca/en/2017/05/landscape-artificial-intelligence-canada/>>. (Aubin & Freedin)

<sup>22</sup> Cam Bunton, “Google Feeds Its AI Machines Steamy Romance Novels to Improve Natural Language Process” (5 May 2016) 9To5Google, Online: <<https://9to5google.com/2016/05/05/google-ai-romance-novels/>>.

<sup>23</sup> Demis Hassabis “AlphaGo: Using Machine Learning To Master The Ancient Game of Go” (2016) The Keyword, Online: <<https://blog.google/topics/machine-learning/alphago-machine-learning-game-go/>>.



mining, is an example of machine learning.<sup>24</sup> Ultimately, the concepts work together to “answer questions, prove hypotheses, and eventually, offer better insight into any market.”<sup>25</sup>

## THE SIGNIFICANCE OF TDM FOR CANADA

There is a growing emphasis on the importance of artificial intelligence AI throughout the world.<sup>26</sup> The government of Canada has made a commitment to supporting innovation and declared ambitions to become a world leader in AI. To facilitate this, Budget 2017 proposed allotting \$125 million to launch a “Pan-Canadian Artificial Intelligence Strategy” to retrain and attract talent from across the globe and position Canada as a “world leading destination for companies seeking to invest in artificial intelligence and innovation.”<sup>27</sup> As well, there has been a \$213 million investment by the federal government in Montreal universities (University de Montréal, McGill University, Polytechnique Montreal and HEC Montreal) as part of Canada First Research Excellence programme aiming to produce world-leading research which would attract brilliant researchers and top talent to Canada.<sup>28</sup> Not only are these new ventures intended to shape Canada into an “economic powerhouse”<sup>29</sup> the anticipated effects are an increase in employment growth, as well as growth in the real estate and services markets as new employees will have

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<sup>24</sup> James Manyika et al. “Big Data: The Next Frontier for Innovation, Competition, and Productivity” (2011) McKinsey Global Institute at 29, Online: <<https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/big-data-the-next-frontier-for-innovation>>. (Manyika et al.)

<sup>25</sup> Upfront Analytics Team, “Data Mining Vs Artificial Intelligence Vs Machine Learning” (13 May 2015) Upfront Analytics (Blog), Online: <<http://upfrontanalytics.com/data-mining-vs-artificial-intelligence-vs-machine-learning/>>.

<sup>26</sup> Aubin & Freedman, *Supra* note 20.

<sup>27</sup> Canada, Tabled in the House of Commons by Minister of Finance, “Building a Stronger Middle Class: Budget 2017” (22 March 2017) at 104, Online: <<https://www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf>> (Budget 2017).

<sup>28</sup> Karen Seidman “Montreal Universities Land Historic \$213M Investment for Computer and Brain Research”, *Montreal Gazette* (15 June 2017), Online: <<http://montrealgazette.com/news/local-news/montreal-universities-get-200m-to-develop-quasi-human-level-computers>>.

<sup>29</sup> Michael Geist “Why Copyright Poses a Barrier to Canada’s Artificial Intelligence Ambitions” (18 May 2017), *Michael Geist* (blog), online: <<http://www.michaelgeist.ca/2017/05/copyright-law-poses-barrier-canadas-artificial-intelligence-ambitions/>>. (Geist)

consumer demands.<sup>30</sup> To put this benefit in perspective, the influx of incoming international students to Canadian universities over the past decade has contributed over \$3.5 billion to the Canadian economy.<sup>31</sup>

Budget 2017 highlighted as well, the necessity of encouraging innovation in order to create new jobs in new industries, transform jobs in existing industries and make it possible for Canada to remain competitive in the global economy. In advance economies, like Canada, “innovation is crucial to competitive edge.”<sup>32</sup>

As stated previously, TDM is an essential part of AI development and machine learning. As such, it will undoubtedly play a large role in achieving Canada’s AI goals. Canada also aims to position itself “on the leading edge of discovery and innovation,” by ensuring that it becomes the home for ground-breaking research.<sup>33</sup> Again, TDM can play an integral role in achieving this goal: the Mckinsey Global Institute estimates a shortage of 140,000-190,000 personnel with the necessary expertise in TDM.<sup>34</sup> If Canada were to position itself as a leader in TDM technologies with the necessary expertise, filling this supply gap, it could meet its goal to attract the ground-breaking research to Canada. Thus, TDM processes and other digital technologies can be valuable tools for stimulating this growth in talent and innovation, and therefore the economy.

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<sup>30</sup> Bloomberg News, “Ontario Tech Sector Booms as Trudeau’s Innovation Strategy Starts taking Shape” *Financial Post* (4 April 2017), Online: <<http://business.financialpost.com/technology/ontario-tech-sector-booms-as-trudeaus-innovation-strategy-starts-taking-shape>>.

<sup>31</sup> P Madgett & C Bélanger, “International students: The Canadian experience” (2008) 14: 3 191 *Tertiary Education and Management* at 195.

<sup>32</sup> Ian Hargreaves “Digital Opportunity: A Review of Intellectual Property and Growth” (2011) An Independent Report by Professor Hargreaves at 3, Online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32563/ipreview-finalreport.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf)>. (Hargreaves)

<sup>33</sup> Budget 2017, *Supra* note 26 at 48

<sup>34</sup> Manyika et al, *Supra* note 23 at 3.

## **PART II: THE CONFLICT BETWEEN COPYRIGHT LAW AND TDM**

There are many benefits to TDM, but what are its potential issues? Access costs for enabling text and data to be mined; entry costs for developing tools for TDM; staff costs for supporting this very specialized activity; transactions cost in obtaining data to be mined; copyright law. The focus of this study is copyright law and how TDM processes may come into conflict with the provisions in the *Canadian Copyright Act*.

TDM, by definition, needs text or data (input) to mine. The materials are then accessed and processed and sometimes copied. Not all copying is an infringement of copyright. Nevertheless, if a *substantial* amount of a *copyright-protected* work is reproduced then that amounts to infringement. At this point, copyright law steps in to halt the infringing activity.

The following issue emerges: on the one hand, there is the legitimate interests and rights of copyright owners. On the other, copyright law is now a barrier to the development of an important process with proven benefits that can help Canada meet its objectives. In assessing how to approach the issue of TDM's conflict with copyright laws, there are a few considerations to keep in mind:

### **Tragedy of the Anti-commons**

Data is ubiquitous, and the data that a researcher may wish to incorporate for TDM processing may be traced to many different sources. The ownership of all this data is, in turn, very fragmented and users must now "navigate an ever more densely populated landscape of increasingly subdivided rights."<sup>35</sup> This problem, referred to as "the tragedy of the anti-commons," can block developments with large value-generating potential, like TDM, by causing high transaction costs, thereby halting progress.

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<sup>35</sup> Hargreaves, *Supra* note 31 at 13.

## **The Consequence of a Digital World**

The conflict at hand is another example of the mismatch between user expectations and how copyright law operates in a digital world. Researchers have been conducting research manually for years without too many problems. TDM is an automated substitute for that manual work. No doubt, users expect that research using works obtained through lawful access should be treated the same, regardless of whether the process is manual or automated, especially given that the final result of their work is new information and not a reproduction of any parts of the original inputs. Here, therefore, the infringing act seems to be “factually an issue of engineering and legally a matter of chance.”<sup>36</sup>

These considerations beg the question: “Could it be true that laws designed more than three centuries ago with the express purpose of creating economic incentives for innovation by protecting creators’ rights are today obstructing innovation and economic growth?”<sup>37</sup>

## **PART III: THE TECHNOLOGICAL PROCESS**

### **Type of Inputs**

The type of data that can be used as inputs for TDM can include books, articles, web posts, social media posts, clicks/likes, graphs, images, videos, sounds, maps, formulas, archives, datasets, databases, etc. The only condition is that the input must exist in a “machine-readable form,” or, be convertible into a machine-readable form.<sup>38</sup>

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<sup>36</sup> David Vaver “Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties” (2007) 57: 4 *Cas W Res L Rev* 731 at 74. Professor Vaver was referring here to TPMs, but the statement applies to TDM as well.

<sup>37</sup> Hargreaves, *Supra* note 31 at 1.

<sup>38</sup> Michael Brook, Peter Muray-Rust & Charles Oppenheim, “The Social, Political, and Legal Aspects of Text and Data Mining (TDM)” 20: 11/12 *D-Lib Magazine*, Online:  
<<http://www.dlib.org/dlib/november14/brook/11brook.html>> (Brook).

## Sources of Inputs

The inputs used in a TDM process may be accessed from a variety of different sources, or levels of access. This section will provide an high-level review of these sources:

- (1) **Self-Created/Self-Generated:** Companies may generate their own data and leverage these for targeted advertising, direct marketing, and make business decisions.
- (2) **Data Freely Available on the Web (All-to-All):** This is data that is freely accessible on the web on a practically “no conditions bases”. Although copyright and other intellectual property rights may apply, anybody can access this data and no terms and conditions attach.
- (3) **Many-to-many:** Primarily data created and shared on social media networks (“user generated content”). Mining such data would be dependent on both the privacy settings of the users and the terms and conditions of the specific social media platform in question.
- (4) **Licence/Subscription (One-to-Many):** The data may be sourced from a publisher, archive or repository or any other source that may lead to contractual relationships like licences and subscriptions. Who may access the data, and how, under what circumstances and for what uses, will be governed by the terms of these contracts.
- (5) **Confidential Data (One-to-one):** Data available from one source to another on a confidential basis. The terms and conditions of the use of such data will be based entirely on the contracts and agreements negotiated between parties.
- (6) **Grey Literature/Public Domain/Creative Commons/Open Access Data:** Data that are typically easier to access, with fewer terms and conditions. Some may have no terms and conditions, and some may have restrictive conditions for their use. “Grey literature” is data voluntarily shared by organizations, “public domain” data are those works that fall outside of copyright protection, “creative commons” and “open access” are sources of data that

allow the use of their copyright-protected works. Open access typically only concerns scientific works, while creative commons license may apply to all types of works.<sup>39</sup> There are many different licenses for these, some more permissive than others.

Note how for many of the above sources of data, contracts and terms and conditions play a role in the level and type of access. Access to such data are first “subject to contractual clauses and as a second layer to intellectual property laws for the remainder.”<sup>40</sup> As well, depending on the nature of the data, privacy laws may act as another layer for consideration.<sup>41</sup> While the focus of this paper is copyright law, it is important to consider how these layers interact with each other and which should supersede the others when it comes to TDM.

### **The Use of Low-Friction Data**

Certain types of data are considered “low-risk” or “low-friction” data.<sup>42</sup> These are data found in the public domain and through open access and creative commons licences; they are easily available and have a low risk of infringing copyright. Why do researchers not simply use these materials instead of copyright-protected materials? It would minimize transactions cost for the researchers, and owners’ rights will not be infringed.

The first reason is patchy availability. Not everything that a researcher will want to know, not all the data available for solving a problem or answering a question, will be available in these low-friction data. For example, in the case of sentiment analysis for a company that wants to know what customers think of its product, none of these sources provide it with the same quality of information as tweets about the product on Twitter.

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<sup>39</sup> Jean-Paul Triaille, Jérôme de Meeûs d’Argenteuil & Amélie de Francquen, “Study on the Legal Framework of Text and Data Mining (TDM)” (2014) De Wolf & Partners at 27 Online <[http://ec.europa.eu/internal\\_market/copyright/docs/studies/1403\\_study2\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf)>. (De Wolf)

<sup>40</sup> De Wolf, *Supra* note 38 at 22 and 27.

<sup>41</sup> Takach, *Supra* note 1.

<sup>42</sup> Levendowski, Amanda. “How Copyright Law Can Fix Artificial Intelligence’s Implicit Bias Problem” (2017). Wash L Rev, Forthcoming, online: <<https://ssrn.com/abstract=3024938>>. (Levendowski)

The second reason is bias. A large part of the public domain are works for which the copyright term has expired. If these works were published in the US, then that would mean they were published in the 1920s. As such, most public domain works would exclude the voices of women, members of the LGBTQ community, racial minorities, and those from less affluent backgrounds.<sup>43</sup> As well, public domain works would not reflect our current linguistics or our current sentiments, making them ill-suited for tasks such as teaching languages to machines or sentiment analysis. Creative Commons-licenced works have similar problems. One of the largest repositories of creative commons-licenced works is contained in the Wikimedia Foundation's projects, which includes Wikipedia, however, as of 2011, only 8.5% of Wikipedia editors were women.<sup>44</sup>

## **The Process**

There are many different processes for TDM. Which process is chosen will depend on the specific conditions of each research project. Factors affecting the choice may include: choice of software, choice of hardware, costs, the time available for the research, the technological contexts, and the type of data.<sup>45</sup> The selection will in turn have different legal implications; in one process, there may be no copying of material, in another only an ephemeral copy, and in another a permanent copy. Therefore, the technique used will play a role in whether copyright infringement takes place.

A very common and general technique is the Extract, Transform, and Load (ETL) technique. There are many other techniques (such as the ELT), but this paper will provide a very general description of the ETL process. The different steps can be described as follows:<sup>46</sup>

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<sup>43</sup> *Ibid* at 31.

<sup>44</sup> *Ibid* at 33.

<sup>45</sup> De Wolf, *Supra* note 38 at 28.

<sup>46</sup> *Ibid*.

1. Individual content is **extracted** from outside sources or **created**
2. Content is **transformed** to fit operational needs
3. Content is **loaded** into a collection;
4. Data miners gain access to the data and the mining (**analysis**) tools are applied to the data set;
5. New knowledge is created as a result of the analysis (usually a **report** will be drafted)

It is in the primary steps (1-3) that copying typically takes place.

For text mining, the process is slightly adjusted, as many textual documents have to be “normalised” to a format that can be used in text mining.<sup>47</sup> In this process, information is retrieved, and then information is *copied* and annotated to create normalised documents. Analysis tools are then applied, information is extracted, and new knowledge is discovered. This conversion is particularly important where text exists in a PDF format. Despite its widespread use, PDF is not a “machine-readable form.” In order to be able to mine the text, therefore, the PDF has to be converted to XML or other machine-readable forms that can be analysed.<sup>48</sup>

Recall, the final step of the TDM process—the drafting of the report containing new knowledge—is the final result of the mining process carrying new insights. Occasionally, an entire picture or map or graph may be reproduced, but those are rare cases, and are neither typical nor the purpose of TDM. In most cases, the report will not reproduce any of the extracted or retrieved information in the first stem.

#### **PART IV: THE CANADIAN COPYRIGHT ACT**

Under the Act, copyright protection attaches to original literary, dramatic, musical or artistic works. The requirements for enjoying copyright protection for works is originality and fixation.<sup>49</sup> Facts, ideas, and works that are not somehow fixed do not have copyright protection.

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<sup>47</sup> McDonald & Kelly, *Supra* note 4 at 14.

<sup>48</sup> Brook, *Supra* note 37.

<sup>49</sup> A third criteria is that it must be appropriately connected to Canada or a member state to WTO, Berne, or UCC.



The Act does not protect discrete data or facts. However, it might protect datasets as they are also included in the definition of a “work” as “compilations.”<sup>50</sup> Compilations are defined as either “a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or parts thereof,” or “a work resulting from the selection or arrangement of data.”<sup>51</sup> To obtain copyright protection an author of a compilation must demonstrate skill and judgement in the selection and arrangement of the materials.<sup>52</sup> Unlike the EU, Canada does not have a *sui generis* database rights, therefore copyright protection extends only to the originality expressed in the selection and arrangement of the compilation and not to the underlying data.

Assuming that conditions for copyright protection are met by any materials included in a TDM process, and assuming that the copying is substantial, then such an activity would be an infringement under s. 3 of the Act. Section 3 outlines the rights granted to authored works. Amongst the specific rights is the right to “produce or reproduce the work or any substantial part thereof in any material form whatever” and the right to authorise such acts.<sup>53</sup>

Most materials that do not constitute a “work” are not a cause of worry for TDM. However, there is another category—that of other subject matter which includes the category of performer’s performances, sound recordings, and broadcasts. If an input falls in one of these categories and a TDM process copies the input or a substantial part of it, that would be an infringement of under sections 15(1), 18(1), and 21(1) of the Act.<sup>54</sup> Note that these categories do not have an originality requirement for copyright protection, as they are not recognized as works.

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<sup>50</sup> *Copyright Act*, RSC 1985, c C-42, s 2, “work”.

<sup>51</sup> *Copyright Act*, RSC 1985, c C-42, s 2, “Compilation”.

<sup>52</sup> *Robertson v Thomson Corp*, 2006 SCC 43 [2006] SCR 363 at para 37. [Robertson]

<sup>53</sup> *Copyright Act*, RSC 1985, c C-42, s 3(1)(a).

<sup>54</sup> *Copyright Act*, RSC 1985, c C-42, s 15(1), 18(1), and 21(1).

## Exceptions

The Act allows for exceptions. Under certain circumstances, even though an activity may technically amount to infringement, users may still be allowed to engage in that activity—granted that they qualify for an exception. These exceptions must not be restrictively interpreted.<sup>55</sup> There are two exceptions of particular note for the purposes of TDM: fair dealing (s. 29) and temporary reproductions in a technological process (s. 30.71).

### Fair Dealing

Once an owner of the copyright proves unauthorized use of a work, the user may invoke fair dealing. There are two layers to a fair dealing assessment: (1) whether the dealing is for one of the allowable purposes enumerated in the provision and (2) whether the dealing is “fair.” The onus is on the user to prove fair dealing.<sup>56</sup>

The enumerated purposes for fair dealing in section 29 are “research, private study, education, parody or satire.”<sup>57</sup> Unlike the U.S. fair use provision, this is a closed and exhaustive list, although these categories are broadly interpreted. Research, for example, is to have a “large and liberal interpretation” and is not limited to “non-commercial or private” uses.<sup>58</sup> Similarly, private study does not exclude studies by students who are part of a school system and it does not require that copyrighted works be viewed in “splendid isolation.”<sup>59</sup>

It can be easily imagined that TDM would fall into one at least one of the enumerated categories, most notably research, and private study. Education, as well, if insights sought for use

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<sup>55</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 SCC 13, [2004] 1 S.C.R. 339, 236 D.L.R. (4th) 395 (CCH).

<sup>56</sup> *Public Performance of Musical Works, Re*, 2012 CarswellNat 2381, 2012 SCC 36, 2012 CarswellNat 2380 [2012] 2 SCR 326, 102 CPR (4th) 241 (**Public Performance**); *Alberta (Minister of Education) v Canadian Copyright Licensing Agency* 2012 SCC 37 [2012] 2 SCR 345 (**Alberta**).

<sup>57</sup> *Copyright Act*, RSC 1985, c C-42, s 29.

<sup>58</sup> *CCH*, *Supra* note 54 at para 51.

<sup>59</sup> *Public Performance*, *Supra* note 55; *Alberta*, *Supra* note 55 at 27.

in improving pedagogy, such as when researchers mined and combined materials about Thomas Jefferson's travels to create new ways to teach history.<sup>60</sup> Generally, when it comes to considering research, it is considered from the perspective of the user, not the person who makes the work available to the user.<sup>61</sup> Most TDM activities may therefore be considered research.

Now that the dealing is determined, we must determine whether it is fair. In *CCH*, the Court laid out factors for assessing whether the dealing is fair, although it emphasized that this is *not* a closed list and other factors may contribute to a fairness assessment. These factors were: (i) the purpose (and commercial nature) of the dealing, (ii) the character of the dealing, (iii) the amount of the dealing, (iv) alternatives to the dealing, (v) the nature of the work, and (vi) the effect of the dealing on the work. The role each factor plays in assessing fair dealing will depend on the facts of each case.

**(i) The Purpose and Commercial Nature of the Work**

Whether or not the dealing is commercial in nature may be an important factor. While the Court emphasized again that research is not limited to non-commercial purposes, "research done for commercial purposes may not be as fair as research done for charitable purposes." This factor should also not be interpreted restrictively.<sup>62</sup>

**(ii) The Character of the Dealing**

How was the work dealt with? Were multiple copies made? Were they widely distributed? Such dealings may be unfair. Were copies destroyed after use? This may favour a finding of fairness. Custom or practice in the industry can also be used to assess fairness.<sup>63</sup>

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<sup>60</sup> Patrica Cohen, "Digital Keys for Unlocking the Humanities' Riches", *The New York Times* (16 November 2010), Online: <<http://www.nytimes.com/2010/11/17/arts/17digital.html>>.

<sup>61</sup> *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2010 FCA 123 320 DLR (4<sup>th</sup>) 342; 403 NR 57; 83 CPR (4<sup>th</sup>) 409; [2010] CarswellNat 1333; [2010] FCJ No 570 (QL) at para 22. (*Bell Canada*)

<sup>62</sup> *CCH*, *Supra* note 54 at para 54.

<sup>63</sup> *Ibid* at para 55.

**(iii) The amount of the Dealing**

Although "for the purpose of research or private study, it may be essential to copy an entire academic article" generally, as the amount of taking increases, the likelihood of finding fair dealing decreases.<sup>64</sup>

**(iv) Alternatives to the Dealing**

If use of a copyright work is not "reasonably necessary to achieve the ultimate purpose," or when alternatives to copyrighted work are available to achieve the same objectives then that would lower the likelihood of finding fair dealing.<sup>65</sup> Importantly, whether or not a licence was available is not necessarily determinative.<sup>66</sup>

**(v) Nature of the Work**

Accompanied with an acknowledgement of the source, "if a work is unpublished, the dealing may be more fair in that its reproduction with acknowledgement" as it could help generate an audience for the work and a wider public dissemination of the work.<sup>67</sup>

**(vi) Effect of the Dealing on the Work**

Whether or not the work in question competes for the market of the original work is "neither the only factor nor the most important factor" although acting as a market substitute or adversely affecting the original work by competing with its market may make it less likely that a dealing is found to be fair.<sup>68</sup> Where previews of songs were made available so that consumers would be able to purchase songs, the Court found that considering the degraded quality and

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<sup>64</sup> *Ibid* at para 56.

<sup>65</sup> *Ibid* at para 57.

<sup>66</sup> D'Agostino, Giuseppina. "Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and Fair Use." (2008) 53 McGill LJ 309 at 322.

<sup>67</sup> CCH, *Supra* note 54 at para 58.

<sup>68</sup> *Ibid* at para 59.

the short duration of the previews “it can hardly be said that previews are in competition with downloads of the work itself.”<sup>69</sup>

Applying these factors to TDM, it is likely, although not certain, that most fair dealing activities would be considered fair dealing. The ambiguity stems from the case-by-case nature of fair dealing. The outcome of each case will be driven by its facts, the interpretation of those facts, the application of those facts, and the determinations of the judge. There have been no cases in Canada as of yet to set the parameters for how fair dealing is applied in TDM cases. Consider, for example, the factor of “effect of the dealing on the work.” Typically, there is no reproduction of the TDM input within the TDM output. However, what if the insights that the process generates in its output, removes the need for any interested parties to read the original input? *CCH* quoted from *Hubbard*: “[i]f they are used to convey the same information as the author, for a rival purpose, that may be unfair.”<sup>70</sup> What would a court determine?

As there are many different applications, uses, purposes and techniques for TDM, it is difficult to state with any certainty that all TDM uses are considered fair dealing, or what circumstances may lead to a failure of finding fair dealing. The case law has not been sufficiently developed.

### **Exception for Temporary Reproductions in a Technological Process**

Section 30.71 of the Act allows an exception for temporary reproductions in a technological process. This exception applies to TDM, as it is a technological process and reproductions are often temporary. The problem arises when reproductions are *not* temporary. Sometimes, the process leads to permanent copies, and sometimes researchers like to keep permanent copies of their inputs to validate their results. It may be possible for researchers to

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<sup>69</sup> *Public Performance*, *Supra* note 55 at para 48.

<sup>70</sup> *CCH*, *Supra* note 54 at para 52, *Hubbard v. Vosper*, [1972] 1 All ER 1023 (CA) at para 1027.

choose other processes or to forgo this level of validation, but the drawback is that copyright law would be dictating the technology, not innovation or the objective of the research. This is inefficient and suboptimal result for anyone hoping to develop AI or research excellence.

## Uncertainty

The overarching conclusion is that there is considerable uncertainty surrounding TDM and whether an existing exception would allow users to engage in TDM. The difficulty with legal uncertainty is that it prevents stakeholders from investing in promising new companies dealing with TDM.<sup>71</sup> It would be difficult to position Canada as attractive grounds for developing and investing in research, AI, machine learning, and TDM, if the fate of those investments is uncertain.

Fair dealing emerges in disputes; one party has proven infringement, the other must now prove fair dealing. Resolving the dispute, in court or out, will be a significant drain on resources—both time and legal costs and opportunity costs of personnel and time to market. 69 percent of small business owners do not maintain capital on hand for possible legal expenses and choose to absorb the costs in their bottom-line. This leads to many small businesses shutting down as a result of legal issues.<sup>72</sup> TDM should not be a ground for such disputes, and the copyright regime should provide certainty without relying on court decisions. If researchers and investors do not see Canada as a safe country, then the copyright regime is impeding the goals for innovation and growth and attracting top talent to Canada.

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<sup>71</sup> ESMOR, “Securing Europe’s Leadership in the Data Economy by Revising the Text and Data Mining (TDM) Exception” (25 September 2017) Members of the Legal Affairs (JURI) Committee: <https://www.esomar.org/what-we-do/news/23/news/228/Securing-Europes-leadership-in-the-data-economy-by-revising-the-Text-and-Data-Mining-TDM-exception>.

<sup>72</sup> DAS Canada White Paper, “Small Business Owners and the Canadian Legal System” (2015) The Canadian Bar Association at page 10, Online: <https://das.ca/DASCanada/media/PDFs/DAS-Whitepaper-SBO-FINAL-June-2015.pdf>.

Uncertainty translates to risk and risk demands a premium. Without it, you forgo the investors, the researchers, and the experts in favour of jurisdictions where their investment of time, money and resources will pay more certain dividends. Two options remain: offer the premium, or reduce the uncertainty. While the discussion of appropriate premiums fall outside the scope of this paper, in the next section I will be discussing the options that will deal with reducing the uncertainty.

## **PART V: OPTIONS**

To lower uncertainty to acceptable levels, this paper will assess three options. The first, self-regulation in the industry without changes to our legal framework. Second, altering our fair dealing provision to resemble fair use in the U.S. The third option is to introduce an exception for TDM in the *Copyright Act*. These options will be assessed on the basis of achieving the greatest level of certainty, but also on their efficiency and effectiveness.

### **Option 1: Self-Regulation**

This option means no changes to the copyright regime in Canada. Instead, the industry self-regulates through negotiations between parties and contracts, such as licensing.

This paper concerns TDM using text and data with lawful access. Therefore, if a researcher is using text or data from a publisher, then they must already have, at least, a licence for access. Publishers believe that this licence does not grant the right to mine, *only* access. Maintaining high-quality materials in a reliable form that is easy to access requires significant investment in “validation, correction and refinements to content” as well as security.<sup>73</sup> As well, if a third-party

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<sup>73</sup> European Commission, *Standardisation in the Area of Innovation and Technological Development, notably in the field of Text and Data Mining*, Report from the Expert Group (2014) at 4, Online: [http://ec.europa.eu/research/innovation-union/pdf/TDM-report\\_from\\_the\\_expert\\_group-042014.pdf](http://ec.europa.eu/research/innovation-union/pdf/TDM-report_from_the_expert_group-042014.pdf). (Expert Group)

programmer were to mine materials on publishers' websites, some publishers maintain this could cause heavy traffic and a crashing of their platforms.<sup>74</sup> Finally, while maintaining that there is little demand currently for TDM, publishers also recognize that this might be a future revenue stream for their businesses and as such want TDM to be appropriately licenced and regulated.<sup>75</sup>

Researchers, on the other hand, maintain that the right to read *is* the right to mine.<sup>76</sup> The licence to access had been sufficient when their research was done manually; it should be sufficient now. Moreover, requiring a separate licence for mining would mean high transactions costs. For example, for a malaria researcher to obtain permission from publishers and journals to mine the information they already had access to, it was estimated it would take 62% of their working year, at a cost of €25,850.<sup>77</sup>

Currently, some publishers prohibit TDM but there are many others offering text or data mining licences for researchers.<sup>78</sup> Some also develop an Application Programming Interface (API)—which make materials machine readable and facilitate subject extraction—and offer API keys upon registration. However, these licences tend to be for non-commercial research only which leads to confusion as academics are increasingly partnering with business for greater access to resources.<sup>79</sup>

There is also a severe fragmentation in the number and types of licences available, and if content comes from multiple different sources, then the solution becomes impractical at scale.<sup>80</sup>

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<sup>74</sup> *Ibid* at 21.

<sup>75</sup> *Ibid* at 15 and 24.

<sup>76</sup> *Ibid* at 14.

<sup>77</sup> SPARC Europe, "Briefing Paper: Text & Data Mining for Research and Innovation Purposes, and its Importance" at 2, Online: <<https://sparceurope.org/wp-content/uploads/2015/09/TDM-briefing-paper-final.pdf>>. (SPARC Europe)

<sup>78</sup> Macquarie University "Publishers and Text and Data Mining" Website, Online: <<http://libguides.mq.edu.au/c.php?g=674396&p=4748809>>.

<sup>79</sup> Expert Group, *Supra* note 74 at 14.

<sup>80</sup> SPARC Europe, *Supra* note 78.



TDM inputs are not limited to scholarly data or text for which licences are readily available. Inputs like tweets, novels, movies, and recipes would all have an uncertain status.

Relying on industry self-regulation would therefore not provide us with sufficient certainty. As well, the arrangements are inefficient and costly and would not scale if demand for TDM were to grow as predicted.<sup>81</sup>

## Option 2: Alter Fair Dealing to Resemble Fair Use

Some commentators believe that a shift from our fair dealing provision towards an exception more closely resembling U.S.'s fair use is advisable.<sup>82</sup> As it has an open list of purposes, the fair use provision is considered more expansive and more facilitative of TDM. Indeed, there are many cases in U.S. where a TDM activity was found to be fair use.<sup>83</sup> However, a wholesale adoption of the fair use doctrine would require more considerations than its impact on AI and TDM, and may be entirely unnecessary.

Recall that in Canada it is highly likely TDM *would* be fair dealing; the difficulty is the lack of jurisprudence that has not provided us with definitive answers. Fair use is deemed superior because of an open list of purposes, but we had no difficulty fitting TDM in fair dealing's closed list.

Consider *Authors Guild v. Google Inc.*<sup>84</sup>: Google scanned books and made them available for searching. When a user searched a term, they were shown snippets—and only snippets—of books containing the searched term. The Court decided that this use was fair use. Would it have

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<sup>81</sup> Expert Group, *Supra* note 74 at 4.

<sup>82</sup> *Geist*, *Supra* note 28.

<sup>83</sup> See for example: *Authors Guild v. HathiTrust* 755 F3d 87 (2d Cir 2014); *White v. West* (SDNY 2014); *Fox v. TVEyes* (SDNY 2014); *Authors Guild v. Google Inc.*, 770 FSupp2d 666 (SDNY 2011); *AV v. iParadigms, LLC* (4th Cir. 2009); *Perfect 10 v Amazon*, 508 F.3d 1146 (9th Cir 2007); *Field v Google*, 412 FSupp2d 1106 (D Nv 2006); *Kelly v. Arriba Soft*, 336 F3d 811 (9th Cir 2003)

<sup>84</sup> *Authors Guild v. Google Inc.*, 770 FSupp2d 666 (SDNY 2011).

been fair dealing if the case had been decided in Canada? There is strong support for the answer 'yes.'<sup>85</sup> The facts of the case closely resemble *Bell Canada*.<sup>86</sup> In *Bell Canada*, previews of songs, much like snippets of books, were made available and consumers could sample them before making a decision to purchase. The Court determined that such use is fair dealing. As such, there is strong support for equivalent results in Canada.

I propose that the reason U.S.'s fair use provision is considered more expansive is that TDM cases have been litigated more in the U.S. The jurisprudence had a chance to develop, and so certainty increased. In Canada, the case law has not had such an opportunity. This difference is not surprising. In 2016, the Federal Court of Canada saw 96 copyright cases.<sup>87</sup> In the U.S., there were 3,944 Federal copyright infringement suits filed throughout the country; this was a 22 percent drop from 2015 where the number was 5,042.<sup>88</sup> The breadth of jurisprudence alone would account for how TDM law has developed in the U.S. and not Canada. Even if fair use were to be adopted, it is doubtful we would receive the same level of clarity in time to facilitate Canada's objectives.

Finally, a fair use analysis remains on a case-by-case basis, and it continues to arise from costly disputes, both of these the same issues as under fair dealing. To conclude, adoption of fair use on does not eliminate uncertainty or the costs of uncertainty that were associated with fair dealing as well.

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<sup>85</sup> See for example: Jill Tonus & Tamara Céline Winegust, "Google Books Held 'Fair Use' in the U.S.—But Would it Be Fair Dealing in Canada?" (27 October 2017) Bereskin & Parr LLP Lexology, Online: <<https://www.lexology.com/library/detail.aspx?g=75191f79-749d-4fa7-a3b1-3f66ef11830e>>.

<sup>86</sup> *Bell Canada*, *Supra* note 61.

<sup>87</sup> IPPractice, "Intellectual Property Proceedings in Federal Court for 2016" IPPractice (Blog) Online: <<https://www.ippractice.ca/litigation-statistics/intellectual-property-proceedings-in-federal-court-for-2016/>>. According to the site there were: 85 copyright infringement actions, 10 copyright infringement applications, and 1 correction of register.

<sup>88</sup> TRAC Reports, "Copyright Infringement Litigation Fell 22 Percent in FY 2016", Online: <<http://trac.syr.edu/tracreports/civil/445/>>.

### Option 3: Introduce a TDM Exception

An exception for TDM can be used to specifically allow for aspects of TDM that we wish to promote. As we understand the contours of TDM and how it operates, both technically and legally, we can calibrate an exception to achieve our desired outcomes. Of the three, this is the superior option.

The question then becomes how to calibrate the exception: what should be the limitations? Do we allow TDM for social good or public interest research only? Do we limit it to scientific research only? Do we limit TDM to certain allowable processes? Some inspiration can be gleaned from other countries who have adopted TDM exceptions:

#### **Japan<sup>89</sup>**

Japan was the first country to have a TDM exception, and it has arguably the most expansive exception.<sup>90</sup> It allows for a making a recording or an adaptation of a work to the *extent deemed necessary* for the purpose of *information analysis by using a computer*.<sup>91</sup>

Information analysis is defined to mean “to extract information, concerned with languages, sounds, images or other elements constituting such information, from many works or other much information, and to make a comparison, a classification or other statistical analysis of such information.”<sup>92</sup> This is a broad definition that allows for many different processes. However, its effect is eroded by limitations to “using a computer.” This binds the exception to specific technologies.

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<sup>89</sup> Copyright Act, (1970) Japan, Article 47septies, online:  
< [http://www.cric.or.jp/english/clj/cl2.html#cl2\\_1+A47septies](http://www.cric.or.jp/english/clj/cl2.html#cl2_1+A47septies) >. (Japan)

<sup>90</sup> DeWolf, *Supra* note 38.

<sup>92</sup> Japan, *Supra* note 91.

However, there is an exception *to* the exception. This is “database works which are made for the use by a person who makes an information analysis.”<sup>93</sup> This could mean, that in circumstances where someone creates a database for the sole purpose of selling it for TDM, or information analysis, then TDM *would* affect the market for the database, and as such the exception does not apply.

### **The U.K.**

The U.K. adopted an exception in 2014 for computational analysis for “non-commercial research.”<sup>94</sup> The primary reason for the “non-commercial” nature of the provision is that E.U. law confines its research exception to non-commercial uses and the U.K. had to operate within the E.U. legal framework.

The exception is mandatory and cannot be overridden by contract law.

### **France**

France enacted an exception in 2016. It is a very narrowly defined exception that allows for only non-commercial “explorations” of text and data “for public research needs included in or associated with scientific results for the needs of public research”<sup>95</sup> It also explicitly restricts the right to conserve and communicate copyright-protected materials to certain organizations.<sup>96</sup>

### **The E.U.**

The E.U. has a proposed exception for “reproductions and extractions made by research organizations in order to carry out text and data mining of works or other subject- matter to which

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<sup>93</sup> *Ibid.*

<sup>94</sup> *Copyright, Designs and Patents Acts 1988*, s29a.

<sup>95</sup> *LOI n2016-1321 du 7 October 2016*, Article 38 of the Act, Online:

<[https://www.legifrance.gouv.fr/eli/loi/2016/10/7/2016-1321/jo/article\\_38](https://www.legifrance.gouv.fr/eli/loi/2016/10/7/2016-1321/jo/article_38)>.

<sup>96</sup> Johnson, *Supra* note 3.

they have lawful access for the purposes of scientific research.”<sup>97</sup> It defines TDM as “any automated analytical technique aiming to analyze text and data in digital form in order to generate information such as patterns, trends and correlations.”<sup>98</sup>

In reaching this proposed exception, the EU originally considered 4 options in their impact assessment. The first option was fostering industry self-regulation initiatives without changes to the EU legal framework. This is very similar to our first option in this study. Ultimately, it was decided that this option would be largely ineffective.

The second option was to have a mandatory exception covering text and data mining for non-commercial scientific research purposes. This was deemed too uncertain to achieve their objectives.

Their third option was a mandatory exception applicable to public interest research organizations covering text and data mining for the purposes of both non-commercial and commercial scientific research. This option was deemed the most proportionate and the final recommended exception was in fact modelled on this option.

Option four was a mandatory exception applicable to anyone who has lawful access (including both public interest and research organizations and businesses) covering text and data mining for any scientific research purposes. This option was determined to be too detrimental to rights holders.<sup>99</sup>

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<sup>97</sup> EC, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, 2016/0280 (COD) art 3, Online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0593&from=EN>>

<sup>98</sup> *Ibid*, art 2.

<sup>99</sup> EC, *Commission Staff Working Document Impact Assessment on the modernization of EU Copyright Rules* SWD (2016) 302 (Part 1 of 3) see pages 104-118, Online: <[http://eur-lex.europa.eu/resource.html?uri=cellar:e065cd0d-7a57-11e6-b076-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:e065cd0d-7a57-11e6-b076-01aa75ed71a1.0001.02/DOC_1&format=PDF)> .

## Commentary

Limiting an exception to “non-commercial” rather than commercial disadvantages the jurisdictions when compared to U.S. where fair use has been found for both commercial and non-commercial TDM.<sup>100</sup> There are challenges in determining what constitutes non-commercial, and what activities, such as partnerships with private sector operators, would constitute commercial use. Given the uncertainty and the risk-averse nature of academic researchers, “if there is any hint that their proposed mining work might be construed as ‘commercial’ it may well put them-off from attempting to do it.”<sup>101</sup> Certain companies in the U.K. have expressed that due to the uncertainty in the U.K. exception they will concentrate their work and investments in their U.S. subsidiaries where the wealth of jurisprudence has made for more certain outcomes.<sup>102</sup>

Similar problems arise when limiting the exception to “public interest” research. It is difficult to define what would be considered “public interest” or not. What proxy do we use to determine whether something is in the public interest? Profits, or the lack thereof? What of a commercial software that copies, for the purpose of detecting plagiarism, copyright works?<sup>103</sup> How does the commercial nature of the product balance against its contributions to academic honesty?

Limitations by scientific purpose are an unnecessary restraint; research has no borders and such a limitation would prohibit useful research into social sciences, cultural and legal works.<sup>104</sup>

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<sup>100</sup> SPARC Europe, *Supra* note 78.

<sup>101</sup> *Ibid.*

<sup>102</sup> McDonald & Kelly, *Supra* note 4 at 32.

<sup>103</sup> *AV v. iParadigms, LLC* (4th Cir. 2009) The court in the U.S. determined that it was fair use.

<sup>104</sup> LIBER Europe, “A Copyright Exception for Text and Data Mining”, Association of European Research Libraries, Online: <<http://libereurope.eu/wp-content/uploads/2015/11/TDM-Copyright-Exception.pdf>>

Should any of the above terms for limitations be used in a TDM exception, then “identifying appropriate mechanisms and organizations to deliver this clarity is a critical step to wider adoption of TDM.”<sup>105</sup>

## **PART VI: FINAL RECOMMENDATION**

I believe constrains like non-commercial, public interest, or scientific research run counter to Canada’s objectives of positioning itself as a center for research and AI development, and that it should forgo such limitations.

If Canada is trying to draw investors and researchers, limiting the use of TDM to non-commercial uses would be a significant hamper on the potential of TDM and the sort of activities it wants to stimulate. The same would apply to a restraint for public interest research and scientific research. Canada will not be able to attract the sort of talent and investment and growth with such limitations.

In research especially, I believe there should not be a limitation to scientific research only. Note how in fair dealing, no such limitations were placed in the use of the work for a research:

“The legislator chose not to add restrictive qualifiers to the word “research” in section 29. It could have specified that the research be “scientific”, “economic”, “cultural”, etc. Instead it opted not to qualify it so that the term could be applied to the context in which it was used, and to maintain a proper balance between the rights of a copyright owner and users’ interests.”<sup>106</sup>

I believe a similar logic applies here.

When considering processes, I propose an expansive definition for TDM such as “automated,” “computational,” or “information” analysis, with a broad definition of the analysis, like the exception in Japan. This would allow for wide uses of TDM and “future-proof” the

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<sup>105</sup> Johnson, *Supra* note 3.

<sup>106</sup> Bell Canada, *Supra* note 61 at para 18.

exception.<sup>107</sup> Some commentators have proposed using the term “data analysis”<sup>108</sup> but in my opinion, that is too wide a definition it would impose too great an imposition on right holders.

As well, recall that copyright is not the sole consideration for TDM; contract and privacy laws are also at issue. Contract law, in particular, should be given special consideration when considering an exception to copyright law, because, without specific provisions preventing it, parties may contract around the exception. This would be an ineffective exception, and why countries that have already created an exception for TDM have made these exceptions mandatory. Therefore, for our purposes, in order for the exception to be effective with sufficient certainty, the exception must be mandatory, without being able to be overridden by individual contracts.

One limitation I would recommend is including a provision in the exception for instances where the final report with the results of a TDM analysis include whole or substantial reproductions of an inputs; where it is practicable, such reproductions are to be removed, or else it amounts to infringement.

To conclude, my final recommendation is to have a mandatory TDM exception, broadly defined, without such restrictions as non-commercial, scientific or public interest uses, but with a limitation for instances where inputs are reproduced in TDM outputs. This will promote innovation, growth, investment and turn Canada into a center for AI development and research excellence, without imposing too great of a cost on copyright owners.

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<sup>107</sup> De Wolf, *Supra* note 38 at 9.

<sup>108</sup> *Ibid.*



## **Commentary on the Recommendation**

### **TPM**

Such an exception does not overcome Technological Protection Measures (TPMs) which are used by copyright owners and holders to prevent access to their works—even lawful access. Circumventing TPMs constitutes copyright infringement under section 41 of the Act and there is no exception for such an infringement.<sup>109</sup> Therefore, publishers and content owners may limit access to text and data through TPMs and researchers will not be able to overcome this restraint, regardless of whether an exception exists or not.

### **Costs to Publishers**

The E.U. Impact Assessment discarded a similar exception as my proposed exception due to high compliance costs for publishers who may need to renegotiate a significant number of business agreements with their commercial customers.<sup>110</sup> Generally, every exception would come with a transition period that would help publishers mitigate the damages from this.

### **Enables; Does Not Ensure**

Finally, even such an exception does not eliminate all risk or uncertainty; some uncertainty always remains depending on the facts of a particular case. And it is important to note that this mechanism only enables Canada to achieve its goals by removing *one* barrier. It does not ensure an outcome as significant investment, knowledge, training, and the right personnel with the right expertise would also be required. Copyright law is an impediment, but its removal is not a guarantee of success.

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<sup>109</sup> *Copyright Act*, RSC 1985, c C-42, s 41.

<sup>110</sup> Impact Assessment, *Supr* note 99 at 117.

## **FURTHER CONSIDERATIONS**

### **Translation**

One major consideration that has not been discussed is that under s.3 of the Act, the author or creator is also the only person who can authorize or make a translation or adaptation. Some people believe that the TDM process not only creates a copy but also, an adaptation. This, therefore constitutes a new tier of infringement, of translation/adaptation rights. Should our exception account for this as well? Japan is the only country so far to consider this as only they included adaptation in their exception.

One reason for the silence by other jurisdictions may be that the TDM process does not translate the material into any natural, human language, but code. This seems logical, but may be another example of how copyright interacts with the digital world. If the TDM process converted a book into a movie, that is a recognized adaptation and derivative works. If it translated an English book into a French book, that is also recognized as an adaptation. Is turning written text into code or a machine-readable form so different from a book into a movie? To further complicate matters, consider that code is also recognized as its own work under the Act and can be protected.

When drafting an exception this may be one area of further investigation.

### **User Generated Works**

We have based much of our analysis on the assumption that the final result of TDM is new information; a report, a chart, etc. Facts. But what if it produces its own content resulting in copyright protected works? Consider Shelley, the AI algorithm trained to write the beginning of horror stories after reading 140,000 Reddit posts. These are new works—previously unseen in the horror genre—that are protected in their own rights, but their source materials are someone else's

protected works.<sup>111</sup> Another example are AIs that were trained, off previous books in the series, to write a chapter of Harry Potter and the next Game of Thrones book.<sup>112</sup> Recall that the EU defines TDM as automated analytical techniques for analyzing inputs in order to “generate information such as patterns, trends and correlations.” Where do these AI-generated works fit within this definition? As using machine learning and TDM to teach AI language, art, and story-telling, the answer to this question will play an important role in the relationship between AI and the law.

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<sup>111</sup>Thu-Huong Ha, “MIT Researchers Trained AI to Write Horror Stories Based on 140,000 Reddit Posts” *Quartz* (30 October 2017), Online: <<https://qz.com/1115179/mit-used-data-from-reddit-to-train-an-ai-to-tell-horror-stories/>>

<sup>112</sup> Max Deutsch, “Harry Potter: Written By Artificial Intelligence” *The Medium* (8 July 2016), Online: <<https://medium.com/deep-writing/harry-potter-written-by-artificial-intelligence-8a9431803da6>> and Sam Hill, “A Neural Network Wrote the Next Game of Thrones Book Because George R. R. Martin Hasn’t” *Motherboard* (28 August 2017), Online: <[https://motherboard.vice.com/en\\_us/article/evvq3n/game-of-thrones-winds-of-winter-neural-network](https://motherboard.vice.com/en_us/article/evvq3n/game-of-thrones-winds-of-winter-neural-network)>.

## **CONCLUSION**

Text and data mining will play an important role in Canada's future and helping Canada achieve its goals of becoming a center for AI development and research, attracting investors and top talent, and stimulating growth and innovation. However, TDM techniques may copy materials in order to process the data. Where this copying amounts to infringement, a tension rises between protecting the copyright owners' interests and removing copyright as a barrier to TDM.

While there are provisions in the Canadian *Copyright Act* that would allow users to engage in TDM, such as fair dealing and temporary reproductions in a technological process, they do not offer sufficient certainty. It is unclear how they would apply to every TDM cases as fair dealing operates on a case-by-case basis and sometimes, the processes involve permanent copies. Certainty is necessary to encourage investment of time and money, and is essential to facilitating Canada's goals.

In resolving this issue, I believe that relying on industry self-regulation through contracts, such as licences, is both inefficient and ineffective and does not remove uncertainty, especially for non-scholarly materials. Adapting our fair dealing would also not have any desirable effects as fair use continues to operate on a case-by-case, where certainty develops through costly disputes decided in court. Given that Canada is not as litigious a country as the U.S., it is unlikely that fair use in Canada would provide any more certainty as we currently have.

I recommend a mandatory, broadly defined, TDM exception for both commercial and non-commercial research, without emphasis on scientific or public interest uses. Otherwise, the exception would be ineffective in facilitating Canada's goals. There should, however, be included a limitation for instances where inputs are reproduced in TDM outputs. This will promote

innovation, growth, and investment in AI and research and turn Canada into a centre for developments in research and digital technologies.

If Canada truly wishes to see itself develop into a global AI center and encourage innovation it must reshape its legal infrastructure to support these ambitions. After all, “the future success of all Canadians relies on it.”<sup>113</sup>

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<sup>113</sup> Budget 2017, *Supra* note 26 at 17.

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[SECURITY CLASSIFICATION]  
CONFIDENCE OF THE QUEEN'S PRIVY COUNCIL

Copyright in the Making –  
LAWG-532

Ellen Desnyder, Alex Dubé &  
Mariam Sarr

## Policy Moot Paper

Pierre-Emmanuel Moyse  
McGill Faculty of Law

15 March 2018

MEMORANDUM TO CABINET

Artificial Intelligence Challenges in the Context of the Copyright Act Review of 2018:  
The Authorship of Computer-Generated Works

Hon. Navdeep Bains  
Minister of Innovation, Science and Economic Development  
&  
Hon. Mélanie Joly  
Minister of Canadian Heritage

15 March 2018

## MINISTERIAL RECOMMENDATIONS

### SUMMARY OF CABINET DECISION SOUGHT

#### ISSUE:

Through AI, computers can create works that might be entitled to copyright protection despite little to no human intervention. The Copyright Act does not regulate the authorship of computer-generated works (CGWs). Should CGWs be granted copyright protection by appointing an author to the works? If yes, who would the author be, and on what basis?

#### DECISION:

It is recommended that CGWs are granted copyright protection, adapted to their specific characteristics, through appointing the user of the AI as the author of the work.

Hon. Navdeep Bains, Minister of Innovation, Science and Economic Development, and Hon. Mélanie Joly, Minister of Canadian Heritage, are the ministers responsible for the implementation of the decision.

The issue should be addressed to the Cabinet as the following question: "Are computer-generated works subject to copyright, and if so, who owns the rights?"

The recommended change will result in the maintenance of Canada's competitive position in the global economy and support AI innovation. This will improve the economic and social well-being of Canadians.

#### RATIONALE AND KEY CONSIDERATIONS:

Action is needed for the fulfillment of Canada's innovation agenda. Canada has indeed been reasserting itself as a major centre of innovation and high-tech businesses, as announced in the 2017 Federal Budget. According to the mandate of Innovation, Science and Economic Development, Canada has to become more productive and competitive in the global economy. In order to be able to fulfill these needs, the question of the authorship of CGWs must be answered. The existing situation has a chilling effect on AI innovation, as is stated on the online platform for Canadian policy options.

The most important consideration associated with the proposed changes entails the fact that the future of AI is still uncertain. The predicted commercialization of AI, on which a major part of this proposal is based, might not come into existence. Therefore, it is possible that the issue of ownership of CGWs might have to be reviewed in the future.

**RELATED APPROVALS:** It is recommended that the following be approved:

**Key Messages (Annex A):** The key messages shall be accepted as describing the essence of the initiative.

**Drafting instructions (Annex B):** The drafting instructions provided for the recommended option 1 are to be implemented.

## BACKGROUND AND OPTIONS

### Background

Canada needs an innovative intellectual property strategy to help make the Canadian industry more competitive in the global economy.<sup>1</sup> The exclusive rights framework of copyright, one of the main intellectual property rights in Canada, provides creators with an economic incentive to create. For copyright to function properly as such an incentive, it must be able to adapt to new technologies, and it must do so in an innovative manner. The principle of technological neutrality, which has been recognized by the Canadian Supreme Court as an important fundament of the copyright regime, confirms this claim. According to the Court, technological neutrality requires that the Copyright Act applies equally between traditional and more advanced forms of the same media.<sup>2</sup> One such new technology falling under the technological neutrality principle is artificial intelligence (AI).<sup>3</sup>

AI can be understood as a set of techniques aimed at approximating some aspects of human cognition by using machines.<sup>4</sup> For the purposes of this policy paper the focus will be on the works that are created by AI. Through AI, computers are able to act as an independent actor and create artistic or innovative works. These machines generate new ideas through the use of software, which mimics the configuration of human neural networks. These networks can work together to assess information and create novel works, which differ from prior art.<sup>5</sup> The copyright standard of originality is sufficiently low that these works created by AI, if they fall under the scope of Section 3 of the Copyright Act, are able to qualify for copyright protection. In what follows, the works that are created by AI and that are entitled to copyright protection will be referred to as Computer-Generated Works (CGWs).

One of the major issues associated with CGWs is the attribution of authorship. The Canadian Copyright Act grants protection to authors of works that fall under its scope.<sup>6</sup> In the past, such authors have always been human. The question thus arises of what has to be done with CGWs, which are produced by non-human authors. In Canada, no specific legislation or case law exists on this matter.

If AI is indeed regarded as a new technology falling under the principle of technological neutrality, the attribution of authorship in relation to CGWs must be clarified. The United Kingdom, Ireland, New Zealand, South Africa and Hong Kong have already recognized this need and have put into place specific mechanisms for CGWs within their copyright regimes.

<sup>1</sup> See the mandate of Innovation, Science and Economic Development Canada. [http://www.ic.gc.ca/eic/site/icgc.nsf/eng/h\\_00018.html](http://www.ic.gc.ca/eic/site/icgc.nsf/eng/h_00018.html).

<sup>2</sup> *Entertainment Software Association v. Society of Composers, Authors and Music Publisher of Canada*, 2010 SCC 34, at para. 5.

<sup>3</sup> Although the very concept of AI dates back to the ideas of Charles Babbage, Ada Lovelace and Alan Turing, in the past few years AI has become an increasingly hot topic.

<sup>4</sup> Ryan Calo, *Artificial Intelligence Policy: a primer and a roadmap*, (2017) SSRN [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015350](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015350), 4.

<sup>5</sup> Kalin Hristov, *Artificial Intelligence and the Copyright Dilemma*, [https://law.unh.edu/sites/default/files/media/hristov\\_formatted.pdf](https://law.unh.edu/sites/default/files/media/hristov_formatted.pdf), 434.

<sup>6</sup> See Section 13 Copyright Act. It must be kept in mind that under some certain circumstances, the author of the work will not be the owner of the copyright.

Moreover, through its recent large investments in AI, Canada has emerged as one of the leaders in this field. As a consequence, AI holds a prominent position as a driver of innovation within Canada. Without a clear regime of the authorship attribution of CGWs, Canada might soon lose this leading position.

This policy paper will present the three best options for action.

**OPTION 1 (recommended): Copyright protection for computer-generated works: the creation of the legal fiction of the user as the author**

**A. Description of the option**

The first option proposes to explicitly bring CGWs within the scope of the Canadian Copyright regime by adding several legal provisions to the Copyright Act. The user of the computer will be regarded as the author of the CGW, and will thus be the first owner of the copyright.<sup>7</sup> The user will enjoy the economic rights pertaining to the work, but will be precluded from asserting any moral rights. These (economic) rights will subsist for a term of fifty years after the year in which the CGW were created. This option is a balanced solution that ensures technological neutrality, is in line with the existing copyright regime, ensures that Canada remains competitive in the AI investment and development market, and does not result in unfair disadvantages for authors of non-computer-generated works.

*1. Within the copyright regime*

CGWs will be brought within the scope of the Copyright Act. This legislative change consists of adding several provisions under the relevant sections of the Act.<sup>8</sup> Two main reasons support the inclusion of CGWs within the existing copyright regime. First, this option is in line with the principle of technological neutrality, as interpreted by the Supreme Court.<sup>9</sup> For example, the Copyright Act equally applies to literary works that are created with pen paper and works created with Microsoft Word, despite the latter being technologically more advanced. Literary works created by AI can then be regarded as another technologically more advanced form of the same media. Second, taking into account copyright's primary role in incentivizing the production and dissemination of works of arts and intellect<sup>10</sup>, the immediate release of CGWs into the public would significantly decrease incentives for creativity and would be counterproductive to the development of AI.<sup>11</sup> The adjustment of the Copyright Act to CGWs is not a drastic change, but rather a logical step in terms of technological neutrality, and in line with the economic purpose of copyright.

<sup>7</sup> Section 13(1) Copyright Act.

<sup>8</sup> See Annex B for the concrete drafting instructions.

<sup>9</sup> *Entertainment Software Association v. Society of Composers, Authors and Music Publisher of Canada*, 2010 SCC 34, at para. 5: "...The principle of technological neutrality, which requires that the Copyright Act apply equally between traditional and more technologically advanced forms of the same media..."

<sup>10</sup> Daniel Gervais, "The purpose of copyright law in Canada" (2005) 2:2 UOLTJ, 315 at 317.

<sup>11</sup> Kalin Hristov, "Artificial Intelligence and the Copyright Dilemma," [https://law.unh.edu/sites/default/files/media/hristov\\_formatted.pdf](https://law.unh.edu/sites/default/files/media/hristov_formatted.pdf), 439.

## 2. Authorship for the user

The creation of this legal fiction will result in the user of the computer becoming the author of the CGW. After having taken into account the interests of all the different parties who are somehow with the AI, it can be concluded that the person who employs the computer holds the strongest claim to authorship.

Neither the Berne Convention<sup>12</sup> nor the Canadian Copyright Act explicitly requires the author of the work to be human. It is however clear that human authorship must be preferred. By attributing copyright to a natural person, instead of a computer with no legal protection, it is ensured that the holder of the rights can be held legally responsible and is able to enjoy all privileges and liabilities associated with the copyright.<sup>13</sup> Moreover, computers have no need of incentives in order to produce works. Appointing a computer as an author would not be benefic for anyone.<sup>14</sup>

Although parties other than the user, namely the programmer and the investor/owner of the AI technology, could assert claims to authorship, appointing the user as the author is the best solution.

According to the Canadian copyright regime, the author is the person who has fixed the work in a tangible medium. Since the user of the computer most immediately and directly causes a work to be generated, they are the person most directly responsible for the fixation of the work and thus holds the strongest claim to authorship.

In addition, one of the foundations of copyright is to reward creativity. A programmer only provides the tool with which the user can express its creativity. The user can use the computer to create works in ways unforeseen by the programmer and for functions beyond the programmer's expertise.<sup>15</sup> Therefore, it is the user's creativity that should be rewarded. This argument becomes somehow more problematic when the actual contribution of the user is minimal because of the elaborate skills of the computer. However, the user will often play a much greater role in shaping the output into a commercially valuable form than merely pressing a button. Often, the user will have to provide detailed instructions to the machine and the output will need substantial modification to be made valuable. This process can be regarded as a substantial creative act in itself.<sup>16</sup>

Finally, the claim of both the investor/owner and the programmer to authorship are weaker than the one of the user. Generally, the user will reward the owner for the use of the technology, either by purchase, license, or lease. Moreover, granting copyrights to investors

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<sup>12</sup> *Berne Convention for the Protection of Literary and Artistic Works*, 1886.

<sup>13</sup> Kalin Hristov, *Artificial Intelligence and the Copyright Dilemma*, [https://law.unh.edu/sites/default/files/media/hristov\\_formatted.pdf](https://law.unh.edu/sites/default/files/media/hristov_formatted.pdf), 447.

<sup>14</sup> Mark Perry & Thomas Margone, "From Music Tracks to Google Maps: Who Owns Computer-generated Works?" (2010) *Law Publications*, Paper 27, 9.

<sup>15</sup> Pamela Samuelson, "Allocating Ownership Right in Computer-generated Works" (1985) 47 *University of Pittsburgh Law Review*, 1185 at 1204.

<sup>16</sup> Pamela Samuelson, "Allocating Ownership Right in Computer-generated Works" (1985) 47 *University of Pittsburgh Law Review*, 1185 at 1204.

would result in the creation of investment laws and goes against the entire copyright regime.<sup>17</sup> The programmer already owns the copyright of the software of the AI.<sup>18</sup> Besides, he will always have the choice to legitimately protect his interest by not distributing the technology.

The choice of the user as author of the work is not only most in line with the existing copyright regime, it also ensures the attractiveness of Canada for AI investment and development. By incentivizing the user to create CGWs, the investors and programmers are also indirectly being benefited.

### *3. Ownership for the user: no moral rights*

According to Section 13(1) of the Copyright Act, the author of a work shall be the first owner of the copyright therein. This option proposes to not alter this provision in relation to CGWs.<sup>19</sup>

The user will also enjoy the economic rights under Section 3 of the Copyright Act. Yet, the moral rights, which are presented in Section 14 and 28 of the Copyright Act and which exist separately from the economic rights, will not be awarded to the user. The moral rights are intrinsically linked to the person of the author. The appointment of the user as the author of the CGW is a legal fiction. Technically, it is the computer that creates. It is therefore a logical choice to keep the users from the enjoyment of the moral rights. In the opposite case, the users would be given an unfair advantage over the 'real' authors of non-computer-generated works.

### *4. Altered term of copyright*

The term of the copyright will be fifty years after the calendar year in which the CGW was created. This is a deviation from the general rule, which states that the term of the copyright comprises the life of the author and fifty years after his death. The reasons for this alteration are similar to the ones mentioned in relation to the exclusion of the moral rights. Since the claim for authorship of the user is a legal fiction, the term of the protection of the CGW should not include the life of the user. The user and his heirs are not entitled to the same length of protection as attributed to authors of non-computer-generated works.

## **B. Advantages**

The proposed option is aligned with the international standards of the UNESCO<sup>20</sup> and the WIPO<sup>21</sup>, and the position of the U.S. National Commission on New Technological Uses of

<sup>17</sup> Jane Ginsburg, "The Concept of Authorship in Comparative Copyright Law" (2003) Columbia Law School, Pub. Law Research Paper No. 03-51, at 28. Available at SSRN: <https://ssrn.com/abstract=368481>.

<sup>18</sup> If conditions for copyright protection for software are fulfilled.

<sup>19</sup> Some authors argue for the disconnection between authorship and ownership within the framework of AI. According to this view, the computer should then be appointed as the author of the work. See: Rex M. Shoyama, "Intelligent Agents: Authors, Makers, and Owners of Computer-Generated Works in Canadian Copyright Law" (2005) 4:2 Canadian Journal of Law and Technology, 129 at 134. As already discussed, however, human authorship must be preferred.

<sup>20</sup> <http://unesdoc.unesco.org/images/0005/000582/058229eb.pdf>.

<sup>21</sup> [http://www.wipo.int/wipo\\_magazine/en/2017/05/article\\_0003.html](http://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html).

## Copyrighted Works (CONTU)<sup>22</sup>

Canada would not be the first country to include CGWs into its copyright regime. The United Kingdom and New Zealand, which are also ruled by a Common Law system, have already done so<sup>23</sup>. Some of these jurisdictions, such as the U.K. and New Zealand, share similarities with the Canadian legal system.

The proposed option only requires the inclusion of certain provisions in the Copyright Act. The Act has been 'future-proofed' before and the proposed legal changes will most likely be part of the planned review of the Copyright Act.

By creating the legal fiction that the user of the AI is the author of the CGW, instead of proposing a more open-ended authorship criterion, the different players are ensured the legal certainty required to fully capitalize on the AI market.

### C. Risks

The way in which the capabilities of AI in relation to copyright will develop is somehow unclear. Therefore, the proposed legislative changes might not be a satisfactory solution anymore in the future, and might have to be revised.

When the contribution of the user to the creation of the work is truly minimal, the created legal fiction that the user is the author of the CGW is not entirely consistent with the Canadian originality concept. It can indeed be asserted from the *CCH v. Law Society of Upper Canada* Supreme Court decision that a work can only be original, and thus be entitled to copyright protection, whenever an exercise of skill and judgment was conducted.<sup>24</sup> It seems difficult to assert that a computer exercised skill and judgment. Therefore, if the user does not exercise any skill or judgment, the work might not be entitled to copyright protection, according to the case law of the Supreme Court.

The legal appointment of the user of the computer as the author of the CGW goes against the traditional paradigm of copyright. Traditionally, a human claiming authorship had to have substantially contributed to the creation of the work.

By creating the legal fiction that the user is the author of the CGW, there is a risk that the user would be encouraged to free ride at the expense of the programmer.<sup>25</sup> Users would benefit from the programmer's and the AI's work without supplying similar levels of effort themselves. As a result, this would disincentivize investment in the technology industry.

<sup>22</sup> CONTU, "Final Report on the National Commission on New Technological Uses of Copyrighted Works" (1981) 3 Computer L.J. 53.

<sup>23</sup> Ireland: Copyright and Related Rights Act 2000 (Act No. 28/2000) § 30; Hong Kong: Copyright Ordinance, (1997) Cap. 528, §§ 17(6), 91(2), 93(2); United Kingdom: Copyright, Designs and Patents Act, 1988, c. 48, § 9(3), 12, 79, 81; New Zealand: Copyright Act of 1994 ss 22(2), 97(2), 100(2) Copyright.

<sup>24</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, at para. 16.

<sup>25</sup> Mark Perry & Thomas Margone, "From Music Tracks to Google Maps: Who Owns Computer-generated Works?" (2010) Law Publications, Paper 27, 8.



## **D. Policy Tools**

### Legislative Change

The Copyright act will have to be amended. See Annex C for the drafting instructions.

### Awareness Campaign

In order to avoid protest from the programmers and investors/owners of AI, these parties have to be made aware of the advantages connected to granting authorship to the user. A statement, explaining these advantages, has to be issued in parallel to the enactment of the legal changes to the Copyright Act.

## **E. Timeline**

The proposed legal changes to the Copyright Act would be part of the 2018 Copyright Act review.

## **OPTION 2: Excluding computer-generated works from any copyright protection**

### **A. Description of the Option**

For our second option, we propose explicitly rejecting copyright protection for computer-generated works both for the developers and the users of AI creative systems, by adding a clause of that effect to the Copyright Act. Because the inconsistencies born from granting such copyright protections would require a wide review of the intent and the goals of the Copyright Act, rejecting those protections has to be considered. Many jurisdictions already made clear legislative statements to confirm that only a human can be the author of a creative work. This option has the potential to negatively impact the appeal of the commercial-use of AI creative systems, but the simple creation of the technology is a profitable venture for investors and programmers.

#### *1. Modifying the nature of the Copyright Act*

Attempting to give CGWs legal protection within the Copyright Act might be difficult on a policy level. CGWs do not fit within the existing framework of the Copyright Act. Currently, the Act does not accommodate authorship issues relating to the creators of CGWs, and the users of the software. Making spaces for those actors would require an overhaul of the current Act, as the latter was created to tackle issues pertaining to works created by human agents, protect their heirs, and incentivize creativity.<sup>26</sup> As Pamela Samuelson explains it, "If there is no human author of such a work, how can any human be motivated to create it?". The copyright system assumes that society awards a set of exclusive rights to authors for limited times in order to motivate them

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<sup>26</sup> Rex. M. Shoyama, "Intelligent Agents: Authors, Makers, and Owners of Computer-Generated Works in Canadian Copyright Law" (2005) 4:2 Canadian Journal of Law and Technology, 13.

to be creative so that their creativity will add to the society's store of knowledge".<sup>27</sup> Copyright is granted with the goal that it will encourage the creation and the propagation of knowledge. To achieve this goal, exclusive rights are granted to the creators of the work. Since CGWs create and propagate knowledge without a clear human creator, the exclusive rights do not have to be granted to the creators.<sup>28</sup> Most of the commonly used CGWs have little to no human and artistic component apart from the human creation of the software that allowed it to exist. While Canadian jurisprudence never explicitly stated that creativity is required for a work to be protected<sup>29</sup>, "the definition of skill and judgement and the omission of labour are closely defined by the SCC to activities performable only by humans".<sup>30</sup>

## *2. Uncertainties surrounding the takeover of AI*

While the field of AI is developing at a fast rate and is currently coined as being the future of scientific research, there is still a lot of uncertainty when it comes to the ways it is going to be incorporated into our societies. AI is part of the "Fourth Industrial Revolution", a series of disruptive technologies that have the potential to affect a wide array of fields, as well as the ways we interact and relate to each other. Yet, it is unclear when these effects will be felt in society as a whole. The pace at which AI would develop has been inflated in the past, leading to a loss of interest in the field and in the funding of AI in the 1980s.<sup>31</sup> Most of the work that is currently undertaken for the development of AI mechanisms falls under the category of narrow AI (also known as weak AI), that are made to perform specific tasks. Those mechanisms have become prominent and effective enough to warrant us to ponder on the protection of CGWs, but several jurisdictions have found ways to incorporate it under their current Copyright Schemes at no cost or modification. In the United Kingdom, the 1998 UK Copyright, Designs and Patents Act (CDPA) doesn't explicitly regulate CGWs. Instead, it tackles the issue of authorship by interpreting section 9(3)<sup>32</sup> of the CDPA in a way that encompasses CGWs: Section 9(3) provides that the author of a computer-generated work is deemed to be the person "by whom the arrangements necessary for the creation of the work are undertaken".<sup>33</sup> Similar provisions can be found in South Africa, New Zealand and Hong Kong.

While this framework doesn't fully resolve the authorship issues surrounding CGWs, it is durable enough to accommodate these technological advancements while waiting to see if it will need to be modified in the near future. Given that technological neutrality is the leading reason for implementing CGWs into the Copyright scheme, waiting to see the way AI develops in the next few years in order to properly assess its impact is aligned with those provisions.

<sup>27</sup> Pamela Samuelson, "Allocating Ownership Right in Computer-generated Works" (1985) 47 University of Pittsburgh Law Review, 1185 at 1223.

<sup>28</sup> Pamela Samuelson, "Allocating Ownership Right in Computer-generated Works" (1985) 47 University of Pittsburgh Law Review, 1185 at 1225.

<sup>29</sup> See *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

<sup>30</sup> Mark Perry & Thomas Margone, "From Music Tracks to Google Maps: Who Owns Computer-generated Works?" (2010) Law Publications, Paper 27, 13.

<sup>31</sup> Patrick Tucker, "The AI Chasers", *THE FUTURIST*, Mar.-Apr. 2008, at 15.

<sup>32</sup> CDPA.

<sup>33</sup> Section 9(3) CDPA.

For an even firmer stance on the matter, Canada could align itself with the Australian Copyright Act, which currently states that only an Australian citizen or a person living in Australia can qualify for authorship<sup>34</sup>, thus explicitly excluding giving authorship to CGWs. Several court decisions have solidified this stance. In *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458, the High Court of Australia held that a work enjoyed copyright protection if it “*was not the result of human authorship but was computer generated*”.<sup>35</sup> In *Telstra Corporation Limited v. Phone Directories Company Pty Ltd*, the court came to a similar conclusion by basing itself on the previous judgment.<sup>36</sup>

## **B. Advantages**

This option would incur little to no costs. It would be essential to open a dialogue with the industry, and conduct studies to assess the propagation of the creation and usage of AI in Canada to ensure that the industry, as well as the public, is included in the next vetting process. In 2012, the government has received a lot of criticism, and was accused of excluding these actors from the amendment process.

This option also fulfills the goal of technological neutrality, while insuring that CGWs remain in the public domain. The public domain has been proven to be extremely important “in terms of fostering the progress of a strong scientific, cultural and economic development”.<sup>37</sup>

## **C. Risks**

Not granting copyright protection for CGWs might potentially have negative commercial consequences. Effectively, the absence of protection could make it difficult for the parties wanting to monetize the works to do so. This lack of profitability might discourage the users of the technology from acquiring and using it.

## **D. Policy Tools**

### Legislative Change

The Copyright act will have to be amended. See Annex C for the drafting instructions.

## **E. Timeline**

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<sup>34</sup> Australian Copyright Act 1968, sec. 32.

<sup>35</sup> *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458. Her Honour held at [2010] FCA 44 at [5].

<sup>36</sup> See *Telstra Corporation Limited v. Phone Directories Company Pty Ltd* [2010] FCA 44, at 5.2.3.

<sup>37</sup> Mark Perry & Thomas Margone, “From Music Tracks to Google Maps: Who Owns Computer-generated Works?” (2010) Law Publications, Paper 27, 22.

We propose to exclude CGWs from any copyright protection at the next amendment of the Copyright Act.

### **OPTION 3 Protection for CGWs under the Copyright Act based on investment and work made in the course of employment**

#### **A. Description of the Option**

##### *1. Authorship concept issues and work made in the course of employment principles*

AI is a conceptual challenge for the copyright regime as it exists today. But this regime has successfully faced similar challenges in the past and proved that it can be malleable when dealing with new paradigms. The development of large-scale contributive works in the audiovisual sector (among others) has led to an evolution of the very notion of authorship and its attribution. Per the

##### *2. Videogame copyright as a prototype of CGWs copyright*

Furthermore, a pertinent precedent would be the series of 80's US court decisions relating to the copyright protecting of videogame displays as audiovisual works<sup>38</sup>. The key there is that courts recognized early on that the audiovisual work displayed through a computer, was copyrightable, and not just the computer code from which it originates. The courts also understood that the value of the videogame was not in its coding, but in the end result that is sound and image<sup>39</sup>. This relates directly to authorship in the context of CGWs and it shows that protecting CGWs doesn't need to be overly complex. On a domestic policy level, it is a strong hint that the Canadian justice system is ready to accept bold moves if it respects the motivations of the Copyright Act.

##### *3. A new regime based on financial investment made by employers*

Under such principles, considering that Canada wants to encourage development the of AI and the tremendous cost of that development, it would be possible to grant copyright protection to CGWs depending the capital invested in the work, as per the work made in the course of employment doctrine. In most cases, this would mean that the copyright would be awarded to the entity employing the AI system's programmers, unless, the market for selling/licensing AI systems far surpasses surprisingly the potential value of rights in CGWs.

Additionally, in apprehension of issues raised by the eventual duplication of work between multiple A.I. system, a new register administered by the existing Registrar of Copyright shall be created to keep track of each specific individual computer system capable of generating work. Copyright protection for CGWs would be conditional to the establishment of a link between a work and a registered computer. This register would permit data gathering on CGWs, greater

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38 See, e.g., *Stern Elec. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982); *Atari, Inc. v. North American Philips Consumer Elec. Corp.*, 672 F.2d 607, 610 (7th Cir. 1982); *Williams Elec., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (1982).

39 Pamela McKenna, "Copyrightability of Video Games: Stern and Atari" (1982) 14 Loy. U. Chi. L.J. 391. at 409.

control over CGWs, and mostly control over the diffusion of CGWs in the coming years.

#### *4. CGWs as a form of expression*

CGWs could be differentiated at their core from other forms of works. Hence, we would suggest that a revised Copyright Act contains dispositions stating that CGWs having materially no human authors constitute an unique form of expression. Just like a photograph of a sculpture is intrinsically different from the sculpture itself, a computer-generated song could be deemed intrinsically different from the live performance of that song. Such a statement should clearly separate the CGWs market from the traditional work market. It would help limit competition and litigation between CGWs owners and traditional creators, especially in conjunction with the proposed register for computers capable of work generation

#### **B. Advantages**

This option avoids the theoretical issues pertaining to the potential ownership rights of an A.I.<sup>40</sup> and the possible employer-employee relationship between a computer-user and its machine<sup>41</sup>. Bypassing these questions of philosophical nature to attribute ownership in a tried and true fashion would frame CGWs in a conventional way and thus reduce apprehension toward CGWs in industrial, commercial and public environment.

Evidently, it is difficult right now to predict what will be the structure of the AI commercial structure, but granting copyright protection for CGWs to employers this way would slow the development of a chaotic market of individual citizen using bought or licensed AI systems to produce CGWs. This slowing effect should not be detrimental for the public wellness, even though it benefits large entities, since it would permit greater control over the fledgling CGW environment and ensure financial opportunities to recoup AI development costs.

#### **C. Risks**

Awarding copyright protection to CGWs to large-scale shareholders in the technology industry could potentially dilute traditional human-authored works. But that same risk exist as long as copyright protection is granted in any form to CGWs. The main political risk is a public backlash, but the communication strategy proposed is designed to expose how this option would apply restraints to the potential volatile CGWs ecosystem.

#### **D. Policy Tools**

##### Legislative Change

<sup>40</sup> See e.g. <https://www.theguardian.com/technology/2017/jan/12/give-robots-personhood-status-eu-committee-argues>; Andrew J. Wu, "From Video Games to AI: Assigning Copyright Ownership to Works Generated by Increasingly Sophisticated Computer Programs", AIPLA Quarterly Journal (1997); <http://arno.uvt.nl/show.cgi?fid=143870>, at 37-38.

<sup>41</sup> Annemarie Bridy, "Coding Creativity: Copyright and the Artificially Intelligent Author (July 18, 2011). Stanford Technology Law Review, Vol. 5, pp. 1-28 (Spring 2012); U. of Pittsburgh Legal Studies Research Paper No. 2011-25. Available at SSRN: <https://ssrn.com/abstract=1888622>. At 26-2.

The Copyright act will have to be amended. See Annex C for the drafting instructions.

#### **E. Timeline**

The proposed legal changes to the Copyright Act would be part of the 2018 Copyright Act review.

## CONSIDERATIONS

### 1. More issues arise from the intersection between AI and Copyright

This policy paper only tackles one of the aspects of AI and copyright, namely the attribution of authorship. The ministers have to take into account that other issues arise from the intersection between AI and copyright, such as the burden that copyright rules are putting on machine learning through text and data mining.<sup>42</sup>

### 2. Ethical and economic concerns arising from the emergence of AI

According to the late professor Stephen Hawking, the efforts to create AI pose a threat to our very existence.<sup>43</sup> He states that AI would take off on its own, and redesign itself at an ever-increasing rate. As a consequence, humans, who are limited by slow biological evolution, could not compete and would be superseded. The famous innovator Elon Musk, shares the same fears. He believes that a handful of major companies will end up controlling the AI systems and that there is a very small chance that humans will be safe from such systems.<sup>44</sup> Although a considerable amount of academics claims that these statements are exaggerated and that there is no need to panic, the ministers should consider such potential dangers of AI, dangers that exceed the Canadian territory.

In the 19<sup>th</sup> Century, the Industrial Revolution created a new class of workers and disrupted traditional models of production. The emergence of AI has the potential to create a similar disruption, in a scale that has never been witnessed before. Yet, these technological advancements might have disastrous consequences on our society, as an increasing amount of labor that is performed by machines. This could lead to mass unemployment, as AI has the potential to perform tasks better than its human counterparts. Will new jobs be created, it is essential that the government takes proactive steps to ensure that the people whose skills have become obsolete can reinvent themselves to remain competitive in the work market. As Noah Harari stated, "the crucial problem isn't creating new jobs. The crucial problem is creating new jobs that humans perform better than algorithms".<sup>45</sup>

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Minister of XXXX

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Other Minister(s), if required  
(in order of precedence)

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<sup>42</sup> Michael Geist, "Why Copyright Law Poses a Barrier to Canada's Artificial Intelligence Ambitions" (18 May 2017), Michael Geist (blog), online: <<http://www.michaelgeist.ca/2017/05/copyright-law-poses-barrier-canadas-artificial-intelligence-ambitions/>>.

<sup>43</sup> Rory Cellan-Jones, "Stephen Hawking warns artificial intelligence could end mankind", *BBC News* (2 December 2014), online: <<http://www.bbc.com/news/technology-30290540>>.

<sup>44</sup> Aatif Sulleyman, "AI is highly likely to destroy humans, Elon Musk warns", *Independent* (24 November 2017), online: <<https://www.independent.co.uk/life-style/gadgets-and-tech/news/elon-musk-artificial-intelligence-openai-neuralink-ai-warning-a8074821.html>>.

<sup>45</sup> Yuval Noah Harari, "The Rise of the Useless Class" (24 February 2017), online: <https://ideas.ted.com/the-rise-of-the-useless-class/>

## **ANNEX A TO THE MR**

### **KEY MESSAGES**

Computer-design related jobs increased by 26% in Ontario over the past five years to 162,000 jobs in 2016, growing faster than jobs in the finance sectors.

In 2017, Ottawa set aside \$125 million for a 5 year Pan-Canadian Artificial Intelligence Strategy.

The Quebec government has allocated \$100 million to the Montreal AI community.

It is crucial that Canada takes a firm stance on matters pertaining CGWs to reassure investors.

With the 2018 Copyright Act Amendment, Canada has the opportunity to take a proactive stance towards artificial intelligence.

Granting the copyright protection to CGWs is in line with Canada's innovation agenda. It will result in the enhancement of Canada's competitive position in the global economy and support AI innovation in Canada. As a result, the economic and social well-being of Canadians will be improved.



ANNEX B TO THE MR

DRAFTING INSTRUCTIONS

**DRAFTING INSTRUCTIONS FOR OPTION 1**

To be added under Section 2 Copyright Act:

***Computer-generated work** means the work that is generated by computer in circumstances such that there is no human author of the work. (oeuvre générée par ordinateur)*

***User** means the natural person who, by employing the computer, took the arrangements for the creation of the computer-generated work. (utilisateur)*

To be added after Section 7 Copyright Act, as Section 7:

***Term of copyright in computer-generated works***

***8.** If the work is computer-generated, the term for which copyright shall subsist shall be fifty years following the end of the calendar year in which the computer-generated work was created.*

To be added under Section 13 Copyright Act, as Section 13(4):

***Computer-generated works***

***(4)** In the case of a computer-generated work, the user shall be taken to be the author of the work and the first owner of the copyright therein. This provision does not affect subsection 3 ("work made in the course of employment").*

To be added under Section 14 Copyright Act, as Section 14.1(5):

***No moral rights for the author of computer-generated works***

***(5)** There shall exist no moral rights for the author of any computer-generated work.*

## DRAFTING INSTRUCTIONS FOR OPTION 2

To be added under Section 2 Copyright Act:

**Computer-generated work** means the work that is generated by computer in circumstances such that there is no human author of the work. (oeuvre générée par ordinateur)

To be added under Section 13 Copyright Act, as Section 13(4):

### **Computer-generated works**

**(4)** Subject to this Act, copyright subsists in a work that is unpublished and of which the author:

- a. was a qualified person at the time when the work was made; or
- b. if the making of the work extended over a period —was a qualified person for a substantial part of that period
- c. In this section, **qualified person** means a Canadian citizen or a person resident in Canada.

### DRAFTING INSTRUCTIONS FOR OPTION 3

To be added under Section 2 Copyright Act:

**Computer-generated work** means the work that is generated by computer in circumstances such that there is no human author of the work. (oeuvre générée par ordinateur)

To be added after Section 7 Copyright Act, as Section 7:

#### **Term of copyright in computer-generated works**

**8.** If the work is computer-generated, the term for which copyright shall subsist shall be fifty years following the end of the calendar year in which the computer-generated work was created.

To be added under Section 24 Copyright Act, as Section 24(d):

**24** The first owner of the copyright:

**(d)** in a computer-generated work, is the owner of the specific individual computer from which the work originates

To be added under Section 13 Copyright Act, as Section 13(3)(a):

**(a)** Where the work is computer-generated, ownership of copyright shall be granted to the owner of the specific individual computer from which the work originates. The authorship of the work shall not be considered.

To be added under Section 14 Copyright Act, as Section 14.1(5):

#### **No moral rights for the author of computer-generated works**

**(5)** There shall exist no moral rights for the author of any computer-generated work

To be added under Section 48 Copyright Act, as Section 48.1:

**48.1** There shall be held register of the computers that produce computer-generated works, maintained by the Registrar of Copyright

**(a)** Copyright in a computer-generated work will be recognized by the Copyright Office if

*(1) the work can be linked to the specific individual computer that generated it and (2) if that specific individual computer is registered at the Registrar of Copyright.*

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committee-argues.



**Pages 219 to / à 221  
are under consultation  
sont sous consultation**

## **Purtell, Pierre-Luc (PCH)**

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**From:** Peloquin, Josee (PCH)  
**Sent:** Thursday, July 19, 2018 11:15 AM  
**To:** Simard2, Josee (PCH); Dahlman, Ian (PCH)  
**Subject:** RE: AI

(maybe we would be better to reach out to Tara and have something about the AI declaration / AI work she is leading for GoC?)

### **Josée Péloquin**

Directrice p.i.  
Marché créatif et innovation, Affaires culturelles  
Ministère du Patrimoine canadien  
25, rue Eddy, Gatineau, Québec K1A 0M5  
[josee.peloquin@canada.ca](mailto:josee.peloquin@canada.ca)  
Téléphone: 819-953-0381

A/Director  
Creative Marketplace and Innovation, Cultural Affairs  
Department of Canadian Heritage  
25 Eddy Street, Gatineau, Quebec K1A 0M5  
[josee.peloquin@canada.ca](mailto:josee.peloquin@canada.ca)  
Telephone: 819-953-0381

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**From:** Theberge, Nathalie (PCH)  
**Sent:** 19 juillet 2018 11:13  
**To:** Peloquin, Josee (PCH) <[josee.peloquin@canada.ca](mailto:josee.peloquin@canada.ca)>; Simard2, Josee (PCH) <[josee.simard2@canada.ca](mailto:josee.simard2@canada.ca)>; Dahlman, Ian (PCH) <[ian.dahlman@canada.ca](mailto:ian.dahlman@canada.ca)>  
**Subject:** AI

Can someone look at this

This impact assessment tool, could it be applicable in our context ? I am thinking that we should have it be discussed at our conference

Alex Benay

## **CIO Government of Canada - Author**

### **1d**

This is the path for AI for the Government of Canada : **CIO Strategy Council** has engaged with the **Standards Council of Canada (SCC)** to develop national, cross sector ethical ai standards for the country across industry, academia and government **Treasury Board of Canada Secretariat | Secrétariat du Conseil du Trésor du Canada** is developing (fully in the open) draft GC Standards on Ethical Use of Automated Decision Systems. Target completion date is fall 2018 Also in development: an Algorithmic Impact Assessment tool to help departments determine ethical impacts in deploying AI. In addition, developing the world's first automated AI Audit algorithm to help identify and even rectify ethical issues in AI services. Canada is now leading the work on ethical AI Principles

with the D9 Lastly, enterprise wide tools and services will be available following the September launch of our GC RFP via **Public Services and Procurement Canada | Services publics et Approvisionnement Canada** ... Check out the RFI closing soon! <https://lnkd.in/dqKRxnN> We will have ethical standards for usage, procurement vehicles for products and services, and a growing data science capacity. **#automation #government #datascience #ethics #algorithms #gcdigital**

\*\*\*\*\*

**Nathalie Th  berge**

Directrice G  n  rale, March   cr  atif et Innovation  
et Sous-Directrice des Investissements  
Minist  re du Patrimoine canadien, Gouvernement du Canada  
25-7-187 rue Eddy, Gatineau (Qu  bec) K1A 0M5  
Courriel: [nathalie.theberge@canada.ca](mailto:nathalie.theberge@canada.ca)  
T  l  phone : 819.934.0971 / T  l  copieur : 819.953.6720

Director General, Creative Marketplace et Innovation  
and Deputy Director of Investments  
Department of Canadian Heritage, Government of Canada  
25-7-187 Eddy Street, Gatineau (Quebec) K1A 0M5  
E-mail: [nathalie.theberge@canada.ca](mailto:nathalie.theberge@canada.ca)  
Phone: 819.934.0971 / Fax: 819.95.-6720

## Purtell, Pierre-Luc (PCH)

---

**From:** El-Alam, Johnny (PCH)  
**Sent:** Wednesday, August 15, 2018 9:45 AM  
**To:** Dahlman, Ian (PCH); Marleau Ouellet, Samuel (IC); Awad, Amy (PCH)  
**Cc:** Riendeau, Natalie (PCH); Simard2, Josee (PCH)  
**Subject:** RE: RPLer working on AI at ISED  
**Attachments:** CFP Art and AI.docx

Thanks for the intro Ian, I will hopefully start getting the RPL newsletter next month...

I am indeed presenting and chairing a panel on *Art and Artificial Intelligence* (attached) at CAA, New York, Feb. 2019. I've already received proposals that are of interest to PCH (copyright concerns, social media artist ranking, etc.) and would be happy to discuss them with whoever is interested.

Cheers,  
Johnny

---

**From:** Dahlman, Ian (PCH)  
**Sent:** Wednesday, August 15, 2018 9:09 AM  
**To:** Marleau Ouellet, Samuel (IC) <samuel.marleauouellet@canada.ca>; Awad, Amy (PCH) <amy.awad@canada.ca>  
**Cc:** Riendeau, Natalie (PCH) <nataliecolette.riendeau@canada.ca>; El-Alam, Johnny (PCH) <johnny.el-alam@canada.ca>; Simard2, Josee (PCH) <josee.simard2@canada.ca>  
**Subject:** RE: RPLer working on AI at ISED

Hi Samuel – this is a frontier the Creative Marketplace and Innovation Branch is beginning to dip its feet into, in terms of diversity of content online (this part of our work dovetails with the work BDC is doing, an effort led by Josée Simard in CC), but we expect to be exploring it in the future in terms of an opportunity to help creators with marketplace issues. Do keep us plugged in.

In the meantime, I'm CCing Johnny El-Alam, a colleague at strategic policy here, who will actually be chairing a panel on AI and the visual arts in the coming months. Definitely someone you should have in your "rolodex" as well.

Best,

Ian Dahlman

Gestionnaire, Laboratoire de marché créatif sur les données, les compétences et la technologie, Direction générale du Marché créatif et Innovation  
Ministère du Patrimoine canadien / Gouvernement du Canada  
[ian.dahlman@canada.ca](mailto:ian.dahlman@canada.ca) / 819-953-6236

Manager, Creative Marketplace Lab on Data, Skills and Technology, Creative Marketplace and Innovation Branch  
Department of Canadian Heritage / Government of Canada  
[ian.dahlman@canada.ca](mailto:ian.dahlman@canada.ca) / Tel: 819-953-6236

**From:** Marleau Ouellet, Samuel (IC)  
**Sent:** Wednesday, August 15, 2018 9:04 AM  
**To:** Awad, Amy (PCH) <amy.awad@canada.ca>  
**Cc:** Dahlman, Ian (PCH) <ian.dahlman@canada.ca>; Riendeau, Natalie (PCH) <nataliecolette.riendeau@canada.ca>  
**Subject:** RE: RPLer working on AI at ISED

Thanks Amy,

Duly noted.

Samuel

Samuel Marleau Ouellet  
Director, ISED G7 Secretariat  
Innovation, Science and Economic Development Canada / Government of Canada  
[Samuel.MarleauOuellet@canada.ca](mailto:Samuel.MarleauOuellet@canada.ca) / Tel: 613-790-9419 / TTY: 1-866-694-8389

Directeur, Secrétariat du G7 pour ISDE  
Innovation, Sciences et Développement économique Canada / Gouvernement du Canada  
[Samuel.MarleauOuellet@canada.ca](mailto:Samuel.MarleauOuellet@canada.ca) / Tél: 613-790-9419 / ATS: 1-866-694-8389

---

**From:** Awad, Amy (PCH)  
**Sent:** August-13-18 8:30 AM  
**To:** Marleau Ouellet, Samuel (IC)  
**Cc:** Dahlman, Ian (PCH); Riendeau, Natalie (PCH)  
**Subject:** FW: RPLer working on AI at ISED

Hi Samuel,

We have not met but Natalie has sent me the message below a few weeks ago. While our group are not experts in AI, we have been looking at the use of algorithms in the context of content curation on digital platforms (social media ....) and the spread of online disinformation.

If you think we might have anything to contribute, please let us know.

Thanks,

Amy Awad  
Gestionnaire, politique relative aux lois et aux règlements  
Direction générale de la radiodiffusion et des communications numériques  
Patrimoine canadien, gouvernement du Canada  
25, rue Eddy, 7<sup>e</sup> étage, Gatineau (Québec) K1A 0M5  
Tél. : 819-994-5529

Amy Awad  
Manager, Legislative and Regulatory Policy  
Broadcasting and Digital Communication Branch  
Canadian Heritage, Government of Canada

25 Eddy Street, 7th floor, Gatineau, Quebec K1A 0M5  
Tel.: 819-994-5529

---

**From:** Riendeau, Natalie (PCH)  
**Sent:** Monday, July 16, 2018 10:24 AM  
**To:** Awad, Amy (PCH) <[amy.awad@canada.ca](mailto:amy.awad@canada.ca)>; Beck, Angela (PCH) <[angela.beck@canada.ca](mailto:angela.beck@canada.ca)>  
**Subject:** RPLer working on AI at ISED

Hi Amy and Angela,

FYI, from the RPL newsletter:

**Samuel Marleau Ouellet** sera Directeur, Secrétariat du G7 pour ISED, durant quelques mois afin de travailler à la mise en œuvre la Déclaration franco-canadienne en matière d'intelligence artificielle . Please get in touch with him if you, or your group, has experience related to Artificial Intelligence, as this is a government-wide initiative which calls for interdepartmental collaboration. Vous pouvez toujours rejoindre Samuel au courriel suivant: [samuel.marleauouellet@canada.ca](mailto:samuel.marleauouellet@canada.ca). Who knows... maybe one day, RPL recruitment process will be AI driven and RPLers will only have to attend get-together social events!

Natalie



Government  
of Canada

Gouvernement  
du Canada

Canada



# Policy Challenge 1: Creative Marketplace Discoverability





## Policy Challenge 2: AI & Copyright



## AI art: who is the author?

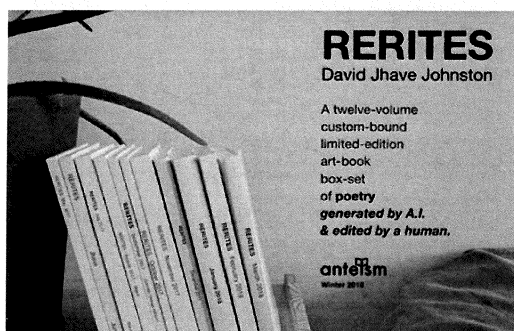


Images generated by White using Barrat's code  
bear a striking resemblance to the Belamy portrait.  
Image: Tom White



AI-made *Portrait of Edmond Belamy* (2018) © Obvious  
Sold for \$432,500 during a Christie's auction in October  
2018.

# AI: an augmentation “tool” or co-author?



ReRites by David Jhave Johnston, 2018-19  
AI-augmented poetry



Maxime Carbonneau, “Siri” (2019),  
theatrical performance interrogating AI



# AI: Source and mining

ING PRESENTS  
**THE NEXT  
REMBRANDT**  
BRINGING BACK THE GREAT MASTER  
TO CREATE ONE MORE PAINTING

How can one of the most forward-thinking banks bring their innovative spirit to their sponsorship of Dutch arts and culture?

We brought back to life Rembrandt, one of the greatest Dutch painters of all time, to create a new painting – 347 years after his death. The painting sparked a global conversation about man vs. machine, and about where innovation can take us.

Together with experts from various fields, over 180,000 fragments from all of Rembrandt's 346 paintings were analysed.

Facial recognition software was designed to understand Rembrandt's style and generate new facial features, which were assembled based on his use of geometrical proportions.

Finally, using a height map to mimic Rembrandt's brushstrokes, the painting was brought to life through an advanced 3D printer that printed 12 layers of paint based ink.

And so, 347 years after his death, a new Rembrandt painting emerged and was unveiled in Amsterdam where experts, the press, and the general public were invited to view the exhibition.

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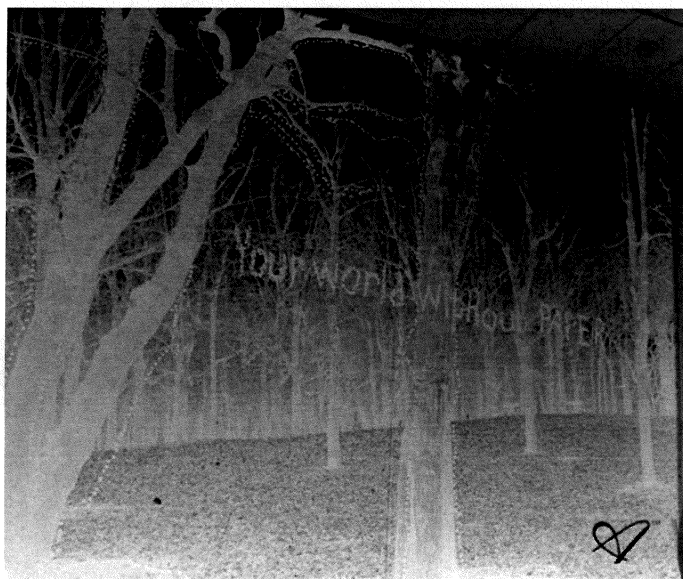
SPONSORING  
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Microsoft

SPONSORING  
PARTNER  
Fondation Rembrandt

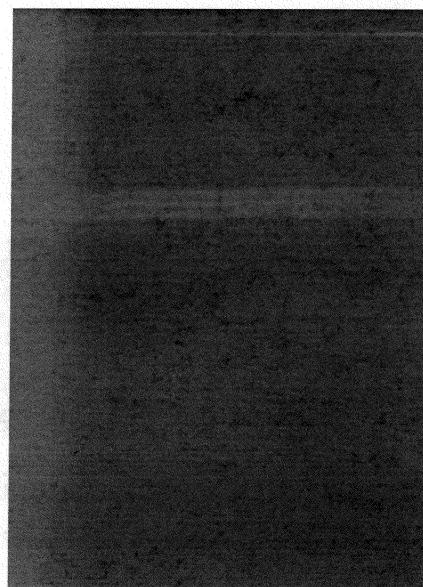
SPONSORING  
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Museum

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Rembrandt

# Quebec Superior Court AI Art Lawsuit



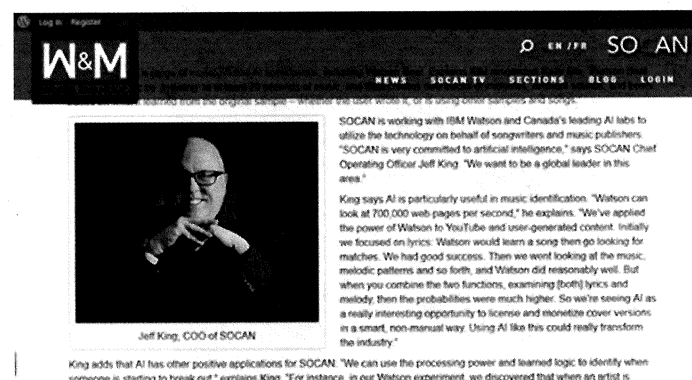
Amel Chamandy, *Your World Without Paper* (2009)



Adam Basanta, 85.81%\_match: Amel Chamandy  
*"Your World Without Paper"*, 2009 created in the  
project *All We'd Ever Need Is One Another*

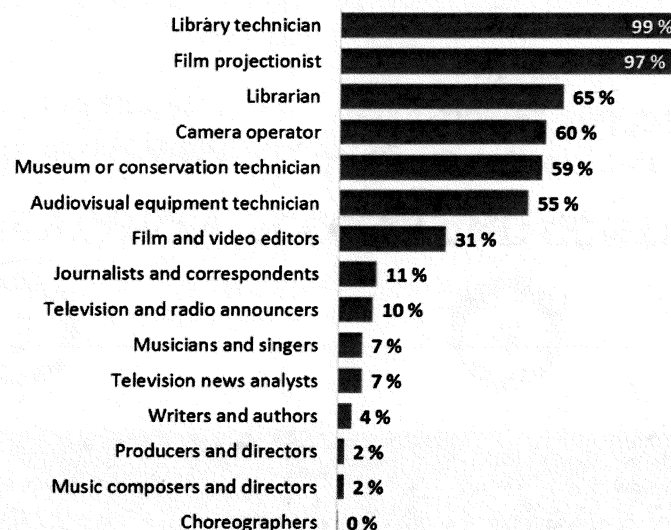


# Policy Challenge 3: AI & Rights Management (Enforcement)



# Policy Challenge 4: The end of established careers in the Arts or beginning of new ones?

**Probability of automation of cultural professions in 2033**



## Developmental phases of AI technology and their current application in the creation of cultural content

1

### DISCOVERY

Determine the added value of the AI for the cultural industry.

Assess the technology necessary to introduce them.

2

### DESIGN

Development of technical capabilities.

Pilot projects and testing phases.

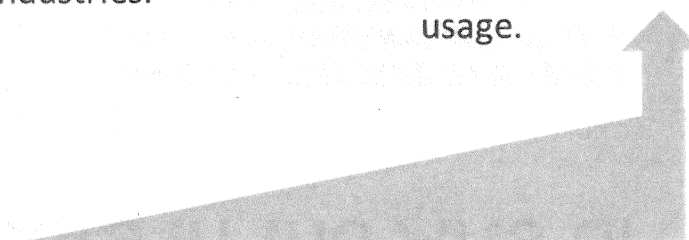
3

### IMPLEMENTATION SUCCESS AND CONTINUITY

Large-scale deployment in cultural industries.

Ongoing improvement of technologies and their usage.

4





# Policy Challenge 5: Expecting the unexpected, AI Gentrification!?

ACCUEIL | INFO | ÉCONOMIE | IMMOBILIER

## Quand l'intelligence artificielle menace les ateliers d'artistes de Montréal

Publié le lundi 7 janvier 2019



Le reportage de Jean-Sébastien Cloutier.

## Policy Challenge 2: AI & Copyright



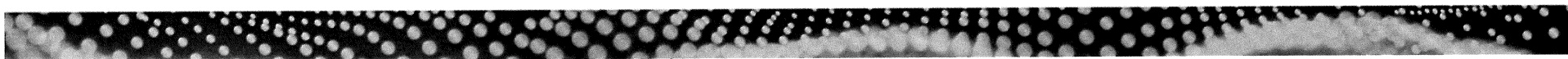
## AI art: who is the author?



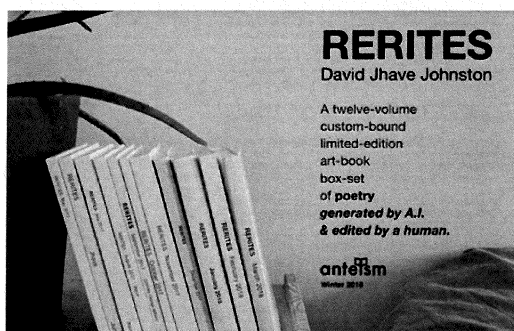
Images generated by White using Barrat's code  
bear a striking resemblance to the Belamy portrait.  
Image: Tom White



AI-made *Portrait of Edmond Belamy* (2018) © Obvious  
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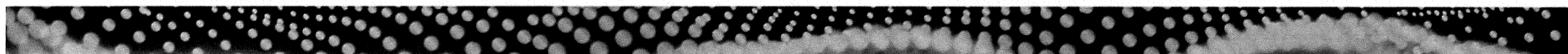
# AI: an augmentation “tool” or co-author?



ReRites by David Jhave Johnston, 2018-19  
AI-augmented poetry



Maxime Carbonneau, “Siri” (2019),  
theatrical performance interrogating AI



# AI: Source and mining

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And so, 347 years after his death, a new Rembrandt painting emerged and was unveiled in Amsterdam where experts, the press, and the general public were invited to view the exhibition.

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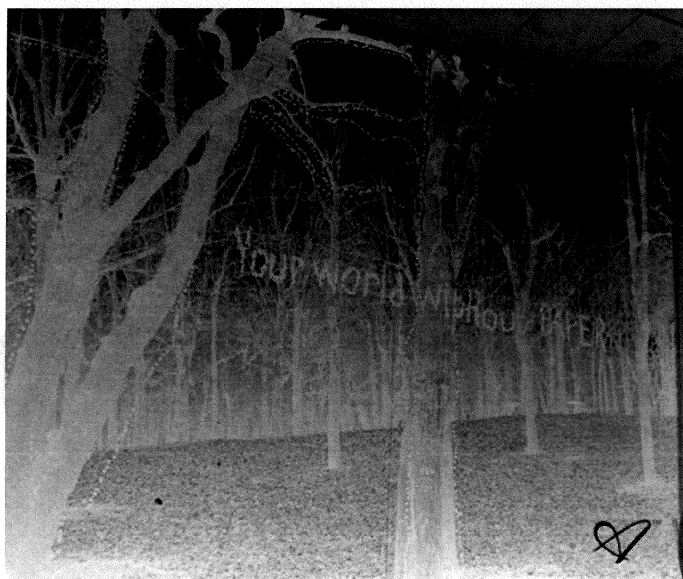
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Microsoft

ARTIST  
Tudor

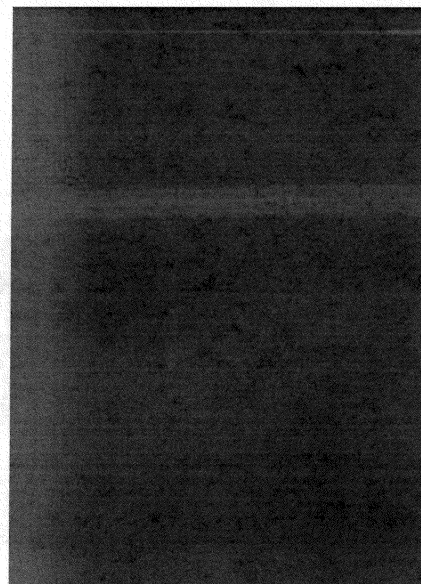
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# Quebec Superior Court AI Art Lawsuit



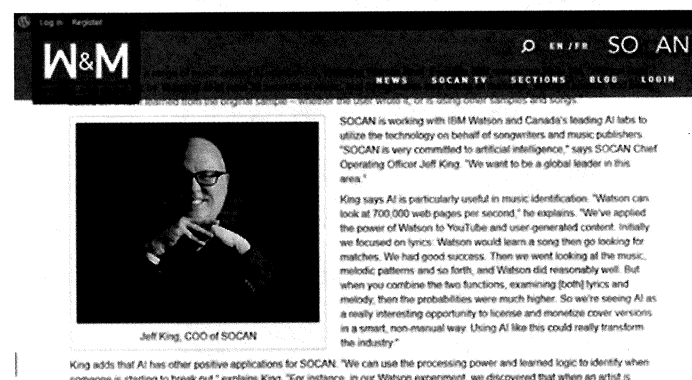
Amel Chamandy, *Your World Without Paper* (2009)



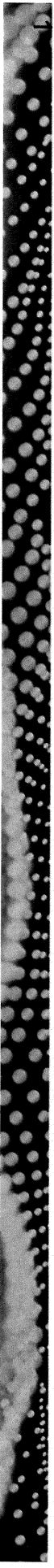
Adam Basanta, 85.81%\_match: Amel Chamandy  
"Your World Without Paper", 2009 created in the  
project *All We'd Ever Need Is One Another*



# Policy Challenge 3: AI & Rights Management (Enforcement)



# Défi politique 2 : L'IA et le droit d'auteur





# L'art par l'IA : qui est l'auteur?

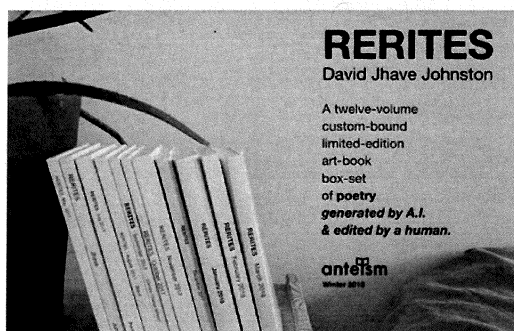


Les images générées par White au moyen du code Barrat ressemble beaucoup au portrait de Belamy.  
Image : Tom White



*Portrait of Edmond Belamy* (2018) © Obvious, généré par IA. Vendu pour 432 500 \$ lors d'une vente aux enchères de Christie's en octobre 2018.

# IA : « outil » d'augmentation ou coauteur?



ReRites, par David Jhave Johnston, 2018-2019  
Poésie augmentée par IA



Maxime Carbonneau, « Siri » (2019),  
Spectacle de théâtre qui interroge l'IA



# IA : Source et exploitation

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And so, 347 years after his death, a new Rembrandt painting emerged and was unveiled in Amsterdam where experts, the press, and the general public were invited to view the exhibition.



**GATHERING THE DATA**  
To bring this project back to life, we gathered the data of Rembrandt's work and analyzed it to create a new painting.

**DETERMINING THE SUBJECT**  
The team Rembrandt's style of work, which was used to create the subject of the new painting.

**GENERATING THE FEATURES**  
A facial recognition software was designed to understand Rembrandt's style and generate new facial features, which were assembled based on his use of geometrical proportions.

**BRINGING IT TO LIFE**  
Finally, using a height map to mimic Rembrandt's brushstrokes, the painting was brought to life through an advanced 3D printer that printed 13 layers of paint based ink.

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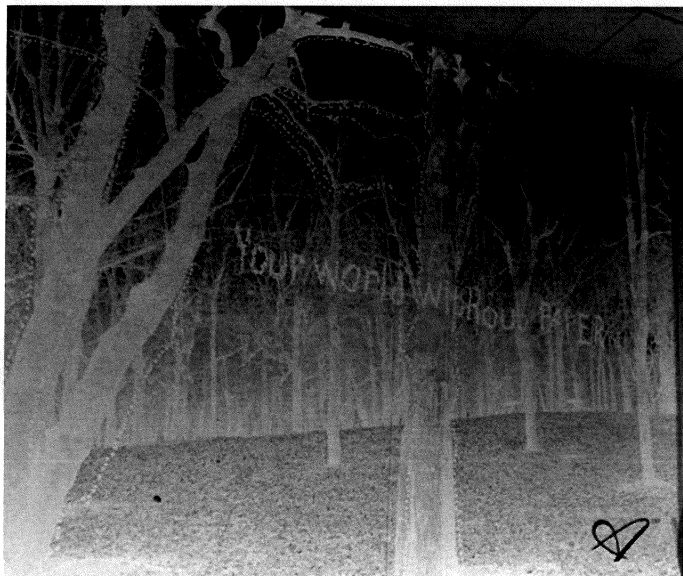
SPONSORED BY  
**Microsoft**

SPONSORED BY  
**Utrecht**

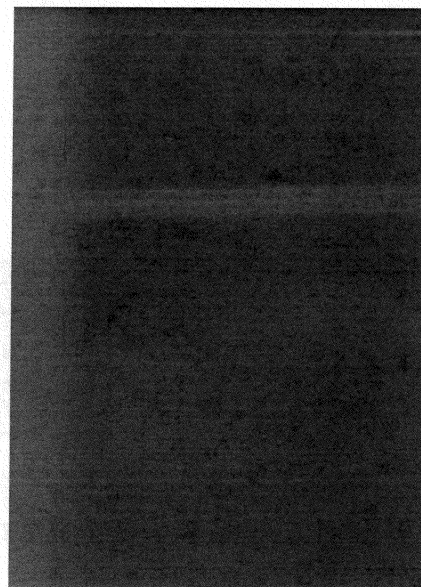
SPONSORED BY  
**Metropolitan Museum of Art**

SPONSORED BY  
**Rembrandt House Museum**

# Poursuite artistique relative à l'IA à la Cour supérieure du Québec



Amel Chamandy, *Your World Without Paper* (2009)



Adam Basanta, *85.81%\_match: Amel Chamandy  
« Your World Without Paper », 2009, créée dans le  
cadre du projet All We'd Ever Need Is One Another*



# Défi politique 3 : IA et gestion des droits (mise en vigueur)



## **Rationale for GOC Intervention (Policy Intent)**

- Support the viability of all creative industries across all sectors to ensure that Canadian creators are fairly remunerated and can continue to participate fairly and effectively in the marketplace. Support Canada's Innovation Agenda while ensuring Canadian creator's receive fair remuneration for the use of their work.

**Commented [PP4]:** Comment by Sheila. The wording of this paragraph was changed/updated.

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## **Policy Options**

- 1) Introduce an AI exception/clarification
- 2) Creation of an AI levy to remunerate creators
- 3) A remuneration/remuneration right for AI (how would this work)  
3)

**Commented [PP5]:** Comment by Zorn: "I'd maybe provide a brief explanation of each here."

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## **International Landscape**

See Annex A & B for a more a detailed breakdown.

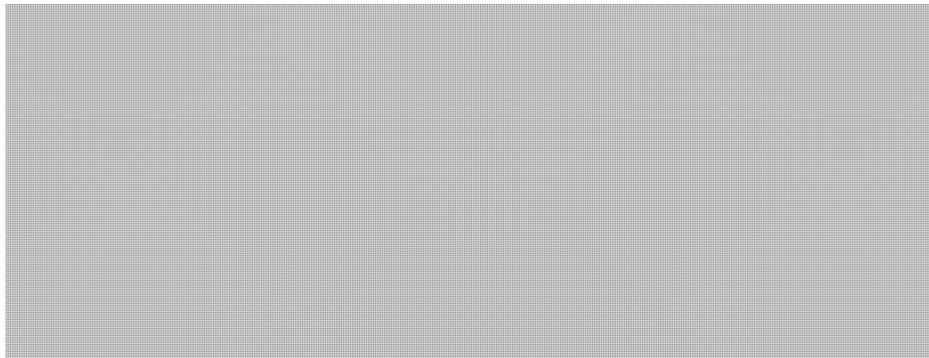
- *Japan:* The first (and arguably most expansive) TDM exception. It allows for making a recording or an adaptation of a work to the extent deemed necessary for the purpose of information analysis by using a computer.
- *United Kingdom:* The U.K. adopted an exception in 2014 for computational analysis for "non-commercial research". The primary reason for the "non-commercial" nature of the provision is compliance with E.U. law that confines research exceptions to non-commercial use. The exception is mandatory and cannot be overridden by contract law.
- *France:* France enacted an exception in 2016. It is a very narrowly defined exception that allows for only non-commercial "explorations" of text and data "for public research needs included in or associated with scientific results for the needs of public research". It also explicitly restricts the right to conserve and communicate copyright-protected materials to certain organizations.
- *The European Union:* The E.U. has proposed an exception for "reproductions and extractions made by research organizations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research. It defines TDM as "any automated analytical technique aiming to analyze text and data in digital form in order to generate information such as patterns, trends and correlations".

Copyright Policy

February-March 143, 2019

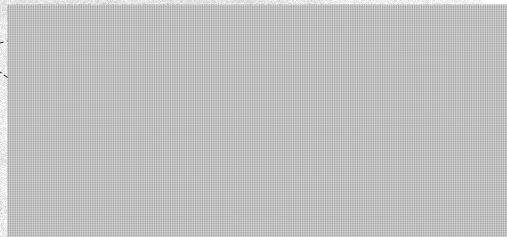
## POLICY PROPOSAL – Artificial Intelligence and Data Mining

### Issue



s.21(1)(a)

s.21(1)(b)



### Background / Context

- The term “AI” commonly refers to the a process of machine learning, a field that blends mathematics, statistics, and computer science to create computer programs with the ability to improve through experience automatically. This is also sometimes known as “machine learning.”
- Most of this machine learning implicates vast amounts of data in order to hone the ability to recognize patterns that can help humans identify anomalies or make predictions. Use of this data may implicate copyright. This technical process is known as “text and data mining” (TDM).
- The Pan-Canadian Artificial Intelligence Strategy was announced in budget 2017 and positioned Canada with the ambitious goal of becoming a global leader in the development of AI.
- Stakeholders involved in AI research want a legal clarification guaranteeing that once a company has obtained and paid for access to a work, they should be able to analyze those works as much as you do when you read a book from a store. Stakeholders have asked for the introduction of an exception allowing for text and data mining, or informational analysis, of lawfully-acquired works.
- Publishers and creators have not submitted a technical ask but generally maintain that the “right to read, is not the right to mine.”

**Commented [PP3]:** Comment by Sheila, need to elaborate on new concern



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**Table 1A – Countries with an Explicit Legislative Exception for Text and Data Mining or Informational Analysis (Cheat Sheet)**

Country	Is there Explicit Language on Lawfully Accessing Source Material?	Is the Exception Limited to Non- Commercial Purposes?	Is the Exception Limited to Research Purposes?	Is the Exception Limited to Scientific Purposes?	Are there Limitations on the Communication or Distribution of Copies?	Are there Limitations on the Storage of Copies?	Can the TDM Exception be Overridden by Contract?	Is Attribution of Source Material Required?
United Kingdom	✓	✓	✓	✓	✓	--	✓	✓
Germany	✓	✓	✓	✓	✓	✓	--	--
France	✓	✓	✓	✓	✓	✓	--	--
Japan	✓	✓	✓	✓	--	--	--	✓
European Union	✓	✓	✓	✓	✓	✓	✓	--

**Commented [PP8]:** Comment by Sheila. Wants me to include more countries and indicate my methodology at the bottom of the table.

Consider reworking/getting rid of. This table was largely inspired by work of Dominic at ISED

**Commented [PP10]:** Need definition

**Commented [PP9]:** Need definition

Legend	
Yes	✓
No	✗
Silent on Matter	--



s.21(1)(a)

s.21(1)(b)

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### Recommended Option and Rationale

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**Commented [PP11]:** Comment by Sheila. Not sure what  
this says/refers to. Need to re-work?!

**Commented [PP12]:** Comments by Sheila. Does not  
understand/not clear

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**Commented [PP13]:** Explain/make more simple/remove

**Commented [PP14]:** Comment by Zorn: "What is this?"

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**Commented [PP15]:** Comment by Zorn: "Aren't there  
two options here? A fair dealing one and a specific  
exception."

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of what a levy is

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## Challenges and Risks

• TBA

## Stakeholder Assessment

Table 1b: Stakeholders views expressed at committee meetings

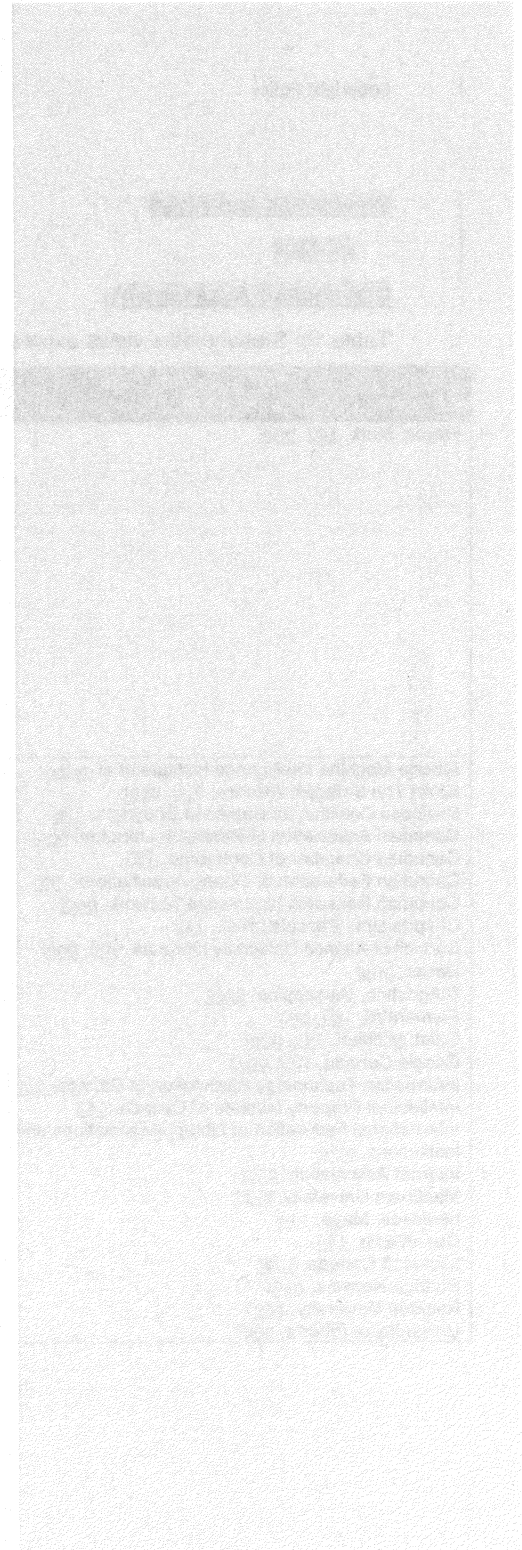
Stakeholders who have raised the issue at Committee Meetings	Position
Hayes, Mark, <a href="#">140</a> , <a href="#">brief</a>	s.21(1)(b)
Alberta Machine Intelligence Institute et al. <a href="#">brief</a>	
BSA   The Software Alliance, <a href="#">130</a> , <a href="#">brief</a>	
Business Coalition for Balanced Copyright, <a href="#">136</a>	
Canadian Association of Research Libraries, <a href="#">brief</a>	
Canadian Chamber of Commerce, <a href="#">136</a>	
Canadian Federation of Library Associations, <a href="#">103</a>	
Canadian Research Knowledge Network, <a href="#">brief</a>	
Chapdelaine, Pascale, <i>et al.</i> , <a href="#">142</a>	
Council of Atlantic University Libraries, <a href="#">106</a> , <a href="#">brief</a>	
Dessa, <a href="#">brief</a>	
D'Agostino, Giuseppina, <a href="#">brief</a>	
Element AI, <a href="#">130</a> , <a href="#">brief</a>	
Geist, Michael, <a href="#">143</a> , <a href="#">brief</a>	
Google Canada, <a href="#">139</a> , <a href="#">brief</a>	
Information Technology Association of Canada, <a href="#">130</a>	
Intellectual Property Institute of Canada, <a href="#">143</a>	
International Federation of Library Associations and Institutions, <a href="#">brief</a>	
Internet Association, <a href="#">brief</a>	
MacEwan University, <a href="#">brief</a>	
Medeiros, Maya, <a href="#">114</a>	
OpenMedia, <a href="#">134</a>	
Microsoft Canada, <a href="#">brief</a>	
Portage Network, <a href="#">brief</a>	
Ryerson University, <a href="#">brief</a>	
University of Alberta, <a href="#">brief</a>	

Commented [PP22]: No further comments by Sheila past  
this point.

Old Code Changed

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## Annexes

### Annex A – Countries with an Explicit Legislative Exception for Text and Data Mining or Informational Analysis

Country	Source Law (Relevant Provisions; Date Introduced)	Permitted Reproductions	Limitations on Purpose of Reproduction	Communication, Distribution, and Storage Limitations	Contractual Override of Legislative Provisions and Attribution of Source Material
United Kingdom	<i>Copyright, Designs, and Patents Act</i> (at s.29A; 2014)	Copies are permitted for “anything recorded in the work”, subject to limitations on purpose	Copies are limited to <b>non-commercial research</b> purposes Note: ‘non-commercial research’ is not defined within the Act	S.29A(2) provides that it is <b>infringement</b> to transfer the copy: <ul style="list-style-type: none"> <li>Without authorization; or</li> <li>To sell or let for hire; or</li> <li>Offer or expose it for sale or hire</li> </ul> The <i>Copyright, Designs, and Patents Act</i> is silent on storage limitations	S.29A(5) provides that the TDM exception <b>cannot be overridden by contract</b>  The reproduction must be accompanied by a <b>sufficient acknowledgement</b> of the source material
Germany	<i>Act on Copyright and Related Rights</i> (at s.60d; 2017)	Copies are permitted for all source materials, subject to limitations on purpose	Copies are limited to <b>non-commercial</b> purposes that “enable the automatic analysis of large numbers of works for <b>scientific research</b> ” to create copies which can be analysed	Sharing of copies extends only to “a specifically limited circle of persons for their <b>joint scientific research</b> [and for] <b>monitoring</b> the quality of scientific research”  Copies must be <b>deleted and can no longer be made available once the research work is completed</b> , but may be <b>transmitted</b> to libraries per s.60e and to archives,	The <i>Act on Copyright and Related Rights</i> is silent on contractual overrides and attribution.



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			Note: 'non-commercial purpose' is not defined within the Act	museums, and educational establishments per s.60f	
France	<u>Code de la Propriété Intellectuelle</u> , (at art. L. 122-5,10°; 2018), adopted via <u>Loi pour une république numérique</u> (at art. 38; 2016)	Copies are permitted for all <b>lawful</b> source materials, subject to limitations on purpose	Copies are limited to those associated with <b>scientific publications, for public research purposes, excluding all commercial purposes</b>	Preservation and communication of technical copies are subject to a <b>declaration</b> from the persons conducting text and data mining or informational analysis. <b>Any other copies or reproductions must be destroyed</b>	The <i>Code de la Propriété Intellectuelle</i> is silent on contractual overrides and attribution
Japan	<u>Copyright Law of Japan</u> (at Article 47septies; 2009)	Copies are permitted for all source materials, subject to limitations on purpose	Copying is limited to the <b>extent necessary in the circumstances</b> .  Copying is permitted for <b>both commercial and non-commercial</b> use	The <i>Copyright Law of Japan</i> is silent on communication, distribution, and storage limitations	The <i>Copyright Law of Japan</i> is silent on contractual overrides.  Article 48(1) provides that the source of a reproduction <b>must be clearly indicated in the manner and to the extent deemed reasonable</b> by the form of the reproduction or exploitation
European Union	<i>DSM Draft Directive</i> (introduced in 2018, currently subject to	Copies are permitted for <b>lawfully accessed</b> works, subject to limitations on purpose	Copying is limited to <b>research organisations conducting scientific research</b>	The <i>DSM Draft Directive</i> suggests an exception that permits <b>storage and communication</b> of copies	The TDM exception proposed <b>cannot be overridden by contract</b>

Field Code Changed

Field Code Changed

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	ongoing discussion)		Note: 'research organization' is not defined within the Act  Copying is permitted for <b>both commercial and non-commercial</b> use		The <i>DSM Draft Directive</i> is silent on attribution
--	------------------------	--	--	--	--

**Annex B – Countries with a General Fair Dealing or Fair Use Legislative Exception that may Permit Text and Data Mining or Informational Analysis**

Country	Source of Law (Relevant Provisions)	Nature of Exception	Test Factors	Applicability to Text and Data Mining or Informational Analysis	Relevant Case Law	Other Relevant Exceptions
USA	<u>US Code: Title 17 - Copyrights</u> (at s.107)	The fair use exception provides that “the fair use of a copyrighted work... for purposes such as... <b>scholarship, or research</b> , is not an infringement of copyright.”	<ul style="list-style-type: none"> <li>• The <b>purpose and character</b> of the use, including whether such use is of a <b>commercial nature or is for nonprofit educational</b> purposes;</li> <li>• The <b>nature</b> of the copyrighted work;</li> <li>• The <b>amount and substantiality of the portion used</b> in relation to the copyrighted work as a whole; and</li> <li>• The <b>effect of the use upon the potential market for or value of</b> the copyrighted work.</li> </ul>	<p>The <b>most relevant fair use category is for research or scholarship</b>, and there is no limitation contained therein to scientific purposes</p> <p>The commercial nature of a use is a <b>factor</b> in the statutory fair use analysis, <b>but it is not determinative</b></p>	<p><u>Authors Guild Inc v Google Inc</u></p> <ul style="list-style-type: none"> <li>• <u>At issue was whether Google’s Library Project and Google Books project, which made digital copies of books to provide search functionality, infringed the copyright of the authors of published books included in the digital repository</u></li> <li>• The copyrighted subject matter at issue is <b>not explicitly connected to a scientific purpose</b></li> <li>• The search and snippet functions for the Library Project and Google</li> </ul>	



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					Books project are available <b>without charge and without advertising</b> , but Google does <b>gain a commercial advantage indirectly</b> because the projects contribute to their presence in the world-wide Internet search market	
Australia	<u>Copyright Act 1968</u> (at s.103C)	Australian law recognizes <b>fair dealing for audio-visual works</b> used for the purpose of <b>research or study</b> .	<ul style="list-style-type: none"> <li>• The <b>purpose and character</b> of the dealing,</li> <li>• The <b>nature</b> of the audio-visual item,</li> <li>• The possibility of obtaining the audio-visual item <b>within a reasonable time at an ordinary commercial price</b>,</li> <li>• The <b>effect of the dealing on the potential market for, or value of, the audio-visual work</b>, and</li> </ul>	<p>The <b>most applicable fair dealing category is for research or study</b>, and there is no limitation contained therein to scientific purposes</p> <p>The <b>commercial nature</b> of the dealing is <b>not determinative</b>, but the purpose and character of the dealing, the possibility of obtaining the work within a reasonable time at an ordinary commercial price, and the effect of the dealing on the</p>	No relevant case law found	



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			<ul style="list-style-type: none"> <li>In a case where only part of the audio-visual item is copied <b>the amount and substantiality of the part copied</b> taken in relation to the whole item</li> </ul>	potential market for, or value of, the work are <b>factors</b> for determining whether the use constitutes fair dealing		
New Zealand	<u>Copyright Act 1994</u> (at s.43 & s.43A)	New Zealand law recognizes <b>fair dealing for works</b> used for the purpose of <b>research or private study</b> . The s.43 fair dealing exception is limited to <b>one copy of the source work</b> .	<ul style="list-style-type: none"> <li>The <b>purpose</b> of the copying</li> <li>The <b>nature</b> of the work copied,</li> <li>The possibility of obtaining the work <b>within a reasonable time at an ordinary commercial price</b>,</li> <li>The <b>effect of the copying on the potential market for, or value of, the work</b>, and</li> <li>In a case where only part of the work is copied <b>the amount and substantiality of the part copied</b> taken in relation</li> </ul>	The <b>most applicable fair dealing category is for research or study</b> , and there is no limitation contained therein to scientific purposes	No relevant case law found	S.43A provides that a reproduction <b>does not infringe copyright</b> if the reproduction is: <ul style="list-style-type: none"> <li><b>Transient</b> or incidental;</li> <li>Is an <b>integral and essential part of a technological process</b> for making or receiving a communication that does not infringe copyright or enabling the lawful use of, or lawful dealing in, the work; and</li> </ul>

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			to the whole item			<ul style="list-style-type: none"> <li>Has no independent economic significance</li> </ul>
Canada	<u>Copyright Act</u> (at s.29)	"Fair dealing for the purpose of <b>research</b> , private study, education, parody, or satire does not infringe copyright"	<ul style="list-style-type: none"> <li>The <b>purpose</b> of the dealing,</li> <li>The <b>character</b> of the dealing,</li> <li>The <b>amount</b> of the dealing,</li> <li>The <b>nature</b> of the work,</li> <li><b>Available alternatives</b> to the dealing, and</li> <li>The <b>effect</b> of the dealing on the work</li> </ul>	The fair dealing exception for research can have broad applicability; however, it is <b>untested whether it captures informational analysis</b> . Various witnesses – including Element AI, BSA / The Software Alliance, and the Information Technology Association of Canada – have expressed support before the Standing Committee on Industry, Science, and Technology in favour of an explicit fair dealing exception for informational analysis	No relevant case law found	<p>S.30.71 provides that it is not an infringement of copyright to make a reproduction of a work or other subject-matter if:</p> <ul style="list-style-type: none"> <li>The reproduction forms an <b>essential part of a technological process</b>;</li> <li>The reproduction's <b>only purpose is to facilitate a use</b> that is not an infringement of copyright; and</li> <li>The reproduction <b>exists only for the duration of the</b></li> </ul>

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							<b>technological process.</b>
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Template

## **POLICY PROPOSAL – Artificial Intelligence and Data Mining**

### **Issue**

- Stakeholders maintain that innovation in AI development is being chilled by legal uncertainty and a lack of copyright jurisprudence in AI issues.

### **Background / Context**

- The term “AI” commonly refers to the process of machine learning, a field that blends mathematics, statistics, and computer science to create computer programs with the ability to improve through experience automatically. This is also sometimes known as text and data mining (TDM)
- Most of this machine learning implicates vast amounts of data in order to hone the ability to recognize patterns that can help humans identify anomalies or make predictions. Use of this data may implicate copyright.

### **Stakeholders’ Asks during Parliamentary Review**

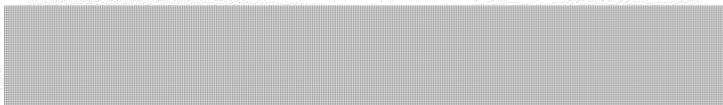
- Stakeholders involved in AI research want a legal clarification guaranteeing that once a company has obtained and paid for access to a work, they should be able to analyze those works as much as you do when you read a book from a store.
- Publishers and creators have not submitted a technical ask but generally maintain that the “right to read, is not the right to mine.”

### **Rationale for GOC Intervention (Policy Intent)**

- The Pan-Canadian Artificial Intelligence Strategy was announced in budget 2017 and positioned Canada with the ambitious goal of becoming a global leader in the development of AI.

s.21(1)(a)

### **Policy Options**





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### **International Landscape**

- *Japan*: The first (and arguably most expansive) TDM exception. It allows for making a recording or an adaptation of a work to the extent deemed necessary for the purpose of information analysis by using a computer.
- *United Kingdom*: The U.K. adopted an exception in 2014 for computational analysis for "non-commercial research". The primary reason for the "non-commercial" nature of the provision is compliance with E.U. law that confines research exceptions to non-commercial use. The exception is mandatory and cannot be overridden by contract law.
- *France*: France enacted an exception in 2016. It is a very narrowly defined exception that allows for only non-commercial "explorations" of text and data "for public research needs included in or associated with scientific results for the needs of public research". It also explicitly restricts the right to conserve and communicate copyright-protected materials to certain organizations.
- *The European Union*: The E.U. has proposed an exception for "reproductions and extractions made by research organizations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research. It defines TDM as "any automated analytical technique aiming to analyze text and data in digital form in order to generate information such as patterns, trends and correlations".
- *United States of America*: the USA has yet to implement a specific exception although it relies on existing court cases and it's broader and more flexible "fair use" doctrine.

### **Recommended Option and Rationale**

- TBA

### **Challenges and Risks**

- TBA

### **Stakeholder Assessment**

### **TABLE 1: STAKEHOLDERS FOR AND AGAINST POLICY RECOMMENDED OPTION**

Template

**TABLE 2: STAKEHOLDERS VIEWS EXPRESSED AT COMMITTEE MEETINGS**

Stakeholders who have raised the issue at Committee Meetings	Position
Intellectual Property Institute of Canada	
BSA – The Software Alliance	
Element AI	
Microsoft	

### **Mandatory Assessments**

#### **GBA+ Assessment**

- Adopting an approach that restricts initial access to databases would privilege the use of biased, low-friction data (BFLD). Given the friction copyright law causes for accessing certain works, many AI creators would turn to easily available, legally low-risk works to serve as training data for AI systems. Data from these works are often demonstrably biased. For example, Wikimedia is a frequently used for AI training and an excellent example of BFLD. In 2011, only 8.5% of Wikipedia editors were women. This editorship gender gap can have measurable effects on the content of Wikipedia articles. For example, the language used to characterized women, as well as the meta data and network structure of articles, marginalize women
- These limited and flawed datasets can lead to dangerous conclusions by AIs with dangerous real life implications. For example, a Taiwanese engineering student was briefly stranded in Australia when he was unable to renew his passport online because the AI system rejected his photo by incorrectly identifying his eyes as being closed.

#### **Modern Treaties Assessment**

- The TRIPs agreement and Berne Convention require Member States to ensure that exceptions to copyright are confined to “certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder”.
- [REDACTED]

#### **Official Languages Assessment**

- No anticipated impact

#### **Strategic Environmental Assessment**

s.21(1)(a)

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- No anticipated impact

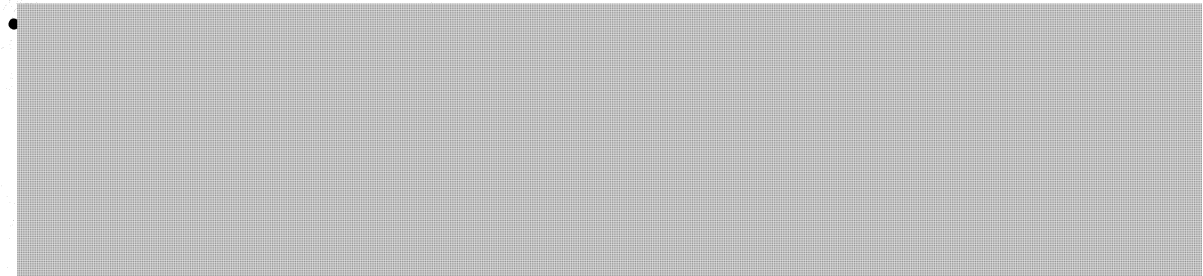
**Supplementary Material**

## **FACT SHEET**

### **Text and Data Mining**

#### **ISSUE**

- Text and data mining (TDM) automates the data analysis process and through analyzing a corpus of inputs can generate reports containing new information and insights that researchers can use for value-added tasks that can improve productivity, cut costs and spur innovation. TDM can also be an important component of Artificial Intelligence (AI) and machine learning which are rising areas of interest.



#### **CONTEXT/BACKGROUND**

- The availability of information has increased exponentially over the past few years. This is due to the high rate of digitization of information, but also social media, user-generated content, and the Internet of Things which generate data at increasing rates. If researchers were able to capitalize on all the available text and data to gain new insight this could have significant societal and economic benefits. However, human researchers are no longer able to read and analyze all the available data at an efficient and practical rate.
- Section 3 of the *Copyright Act* states that if a substantial part of a copyright work is copied by someone other than the author, or not authorized by the author, then that copying amounts to infringement. In the case of TDM processes, sometimes substantial copies may be made in order to generate a report, although the final result does not typically contain any reproductions of the source materials.
- [Redacted]
- The temporary reproductions for technological process exception in the *Copyright Act* (Section 30.71) may allow some TDM activities, provided that they result in temporary copies.



#### **CONSIDERATIONS**

##### *Stakeholder Views*

##### Stakeholders against TDM exceptions:



s.21(1)(a)

s.21(1)(b)

- **Publishers/Rights Holders:** Publishers want to be able to control the use of their materials as inputs through TDM licences. This way they can monetize the TDM process, and also recoup their costs in arranging for their data to be stored securely and in a way that is easier to use in TDM analyses. [REDACTED] It also allows them to control the traffic on their website and the use of their works; for example, they often set a limitation in their TDM licences that researchers may only use their materials for non-commercial or scientific research.

Stakeholders in favour of TDM exceptions:

- **Researchers:** Researchers believe a TDM exception that allows its use for both commercial and non-commercial research, as well as both scientific and non-scientific researcher is necessary in order to have TDM reach its full potential. It is hard to distinguish where something becomes commercial, especially in cases where researchers partner with businesses that have greater access to resources. [REDACTED]

- [REDACTED]

**LAST UPDATED:** 10/2526/2018

**Pages 271 to / à 328  
are under consultation  
sont sous consultation**

**Table 4 – Database Rights for Countries with Explicit or General Exceptions for Text and Data Mining or Informational Analysis**

Country	Source of Law (Relevant Provisions)	Database Rights	Database-Specific Use Limitations
United Kingdom	<i>Copyright, Designs, and Patents Act 1988</i> Regulations 13, 14, and 17(2)	Regulations 13 and 14 provide that database rights automatically vest if there has been a “ <b>substantial investment</b> in obtaining, verifying, or presenting the contents” of the database  Per Regulation 17(2), database rights remain in force for 15 years after making the database viewable to the public	Database rights are infringed where a person, <b>without consent</b> , “extracts or re-uses <b>all or a substantial part</b> of the contents of the database”, whether all at once or by repeated extractions of “insubstantial” parts.  Any lawful user of the database has a right under Regulation 19(1) “to <b>extract or re-use insubstantial parts</b> of the data for any purpose”, and <b>that right cannot be restricted</b> by the database owner (regulation 19(2))  The term “substantial” is defined to mean “substantial in terms of quantity or quality or a combination of both”
Germany	<i>Act on Copyright and Related Rights</i> (at s.4, s.55a, 60d(2))	S.4 defines <b>collections</b> and <b>database works</b>  S.4(1) provides that “ <b>Collections</b> of works, data or other independent elements which by reason of the <b>selection or arrangement</b> of the elements constitute the author’s own intellectual creation (collections) are protected as independent works”	S.55a provides specific use conditions for database works resulting from text and data mining or informational analysis. It states that “the adaptation or reproduction of a database work shall be permissible for the <b>owner of a copy of the database work</b> , [a] person <b>otherwise authorised</b> to use the database work, or [a] person... given access to the database work... on the basis of a <b>contract</b> ”. Furthermore, if access is given as part of a contract “ <b>only to a part of the database work</b> , only the adaptation and

		<p>S.4(2) defines a 'database work' as "a <b>collection whose elements are arranged systematically or methodically</b> and the individual elements are individually accessible by electronic or other means". A <b>computer program</b> "used in the creation of the database work or to provide access to its elements <b>does not constitute an integral part of the database work</b>"</p>	<p>reproduction of that part shall be permissible".</p> <p>S. 60d(2) provides that "if <b>insubstantial</b> parts of [text and data mining or informational analysis] databases are used... this shall be <b>deemed consistent with the normal utilisation of the database and with the legitimate interests</b> of the producer of the database". That is to say, it is a permitted use.</p>
France	<p><i>Code de la Propriété Intellectuelle</i>, (at art. L342-1, L342-2, L342-3)</p>	<p>A database is <b>not differentiated</b> from other forms of copyrightable works, subject to the use limitations in the next column</p>	<p>Per art. L342-1, the creator of a database has the right to <b>prohibit the extraction of all or a qualitatively or quantitatively substantial part</b> of the contents of a database ("Le producteur de bases de données a le droit d'interdire l'extraction, par transfert permanent ou temporaire de la totalité ou d'une partie qualitativement ou quantitativement substantielle du contenu d'une base de données sur un autre support, par tout moyen et sous toute forme que ce soit")</p> <p>Art. L342-1 also provides that the creator has the right to <b>prohibit reuse by sharing a qualitatively or quantitatively substantial part</b> of the content of the database ("La réutilisation, par la mise à la disposition du public de la totalité ou d'une partie</p>



			<p>qualitativement ou quantitativement substantielle du contenu de la base, quelle qu'en soit la forme.”)</p> <p>Art. L342-2 provides that the creator can <b>prohibit the repeated or systematic extraction or reuse of qualitatively or quantitatively insubstantial parts</b> of the content of the database where such operations will <b>exceed the normal use</b> of the database. (“Le producteur peut également interdire l'extraction ou la réutilisation répétée et systématique de parties qualitativement ou quantitativement non substantielles du contenu de la base lorsque ces opérations excèdent manifestement les conditions d'utilisation normale de la base de données.”) The standards for ‘normal use’ of a database are not explicitly defined.</p> <p>Art. L342-3 provides that a database right holder <b>cannot prohibit</b> extraction from:</p> <ul style="list-style-type: none"> <li>- A <b>non-electronic</b> database for <b>private purposes</b> per L342-3(2)</li> <li>- A database for <b>non-recreational educational</b> purposes per L342-3(4)</li> <li>- A database for the purpose of <b>searching</b> texts or data included per L342-3(5)</li> </ul>
Japan	Copyright Law of Japan (at art.2(1)(xter), art.12, art.12bis, art.47septies)	Art.2(1)(xter) defines a ‘ <b>database</b> ’ as “an <b>aggregate of information</b> such as articles, numericals or diagrams, which is <b>systematically constructed</b> so that such information can be	Art.47septies provides that the informational analysis reproduction and adaptation exception for source materials <b>does not apply</b> to “database works which are made for the use by a person who makes an information

		<p>retrieved with the aid of a computer". (see Art.12<i>bis</i> below)</p> <p>Art.12(1) defines a '<b>compilation</b>' as subject matter "not falling within the term "databases"... which, by reason of the <b>selection or arrangement of their contents</b>, constitute intellectual creations <b>shall be protected as independent works.</b>"</p> <p>Art.12<i>bis</i> provides that "<b>databases</b> which, <b>by reason of the selection or systematic construction of information contained therein, constitute intellectual creations</b> shall be <b>protected</b> as independent works." In combination with art.2(1)(<i>xter</i>) above, <b>databases may constitute protectable copyright</b>, with the test examining the nature of the selection or construction of the information contained therein for intellectual creativity</p>	<p>analysis". That is, the products of text and data mining or informational analysis cannot be freely used by non-owners for text and data mining or informational analysis</p>
European Union	Directive 96/6/EC of 11 March 1996 on the Legal Protection of Databases	<p>Database rights are <b>independent of copyright</b></p> <p>The <b>arrangement, selection, and presentation</b> of data may be protected by copyright if there is creative ingenuity, but the database as a whole can also be protected by</p>	<p>A database owner may <b>object to reproductions of a substantial portion</b> of their database, even if insubstantial portions are extracted over time and the reproductions eventually collectively constitute a substantial portion</p>



		<p>database rights, which are afforded to manual computer records</p> <p>Database rights last <b>15 years</b> from the date of creation</p> <p>If a database is <b>substantially modified</b>, a new set of database rights are created for the nascent database</p> <p>Database rights are created automatically – no registration is required to take effect</p>	
USA	No explicit database rights are recognized in American statute.	<p>No explicit database rights are recognized in American statute.</p> <p>Uncreative collections of facts fall outside the Congressional authority found under the Copyright Clause (art.1, s.8, cl.8 of the US Constitution).</p> <p>Database owners have <b>unsuccessfully lobbied</b> for the introduction of statutory database rights</p>	No explicit database rights are recognized in American statute
Australia	No explicit database rights are recognized in Australian statute.	No explicit database rights are recognized in Australian statute. As such, databases are subject to the	No explicit database rights are recognized in Australian statute.



		normal protections and limitations of Australian Copyright law	
New Zealand	<i>Copyright Act 1994</i> (at s.2(1))	No explicit database rights are recognized in New Zealand's copyright act. However, s.2(1) defines a 'compilation' as "... (c) a <b>compilation of data</b> other than works or parts of works", with compilations constituting 'literary works' per its definition under s.2(1). Consequently, literary works (including compilations) are subject to <b>normal copyright protections and limitations</b>	See previous column
Canada	<i>Copyright Act</i> (at s.2)	No explicit database rights are recognized in Canada's copyright act. However, s.2 defines a 'compilation' as "... (b) a work resulting from the <b>selection or arrangement of data</b> ". Compilations can constitute various forms of protectable works under the Act, depending on their subject matter (eg. an 'artistic work', 'dramatic work', etc.). Consequently, compilations are subject to <b>normal copyright protections and limitations</b>	See previous column

			the copyrighted work.		Project and Google Books project are available <b>without charge and without advertising</b> , but Google does <b>gain a commercial advantage indirectly</b> because the projects contribute to their presence in the world-wide Internet search market	
Australia	<u>Copyright Act 1968</u> (at s.103C)	Australian law recognizes <b>fair dealing for audio-visual works</b> used for the purpose of <b>research or study</b> .	<ul style="list-style-type: none"> <li>• The <b>purpose and character</b> of the dealing,</li> <li>• The <b>nature</b> of the audio-visual item,</li> <li>• The possibility of obtaining the audio-visual item <b>within a reasonable time at an ordinary commercial price</b>,</li> <li>• The <b>effect of the dealing on the potential market for, or value of,</b></li> </ul>	<p>The <b>most applicable fair dealing category is for research or study</b>, and there is no limitation contained therein to scientific purposes</p> <p>The <b>commercial nature</b> of the dealing is <b>not determinative</b>, but the purpose and character of the dealing, the possibility of obtaining the work within a reasonable time at an ordinary commercial price, and the effect of the</p>	No relevant case law found	

s.21(1)(a)



**Table 3 – Countries with a General Fair Dealing or Fair Use Legislative Exception that may Permit Text and Data Mining or Informational Analysis**

Country	Source of Law (Relevant Provisions)	Nature of Exception	Test Factors	Applicability to Text and Data Mining or Informational Analysis	Relevant Case Law	Other Relevant Exceptions
USA	<u>US Code: Title 17 - Copyrights</u> (at s.107)	The fair use exception provides that "the fair use of a copyrighted work... for purposes such as... <b>scholarship, or research</b> , is not an infringement of copyright."	<ul style="list-style-type: none"> <li>• The <b>purpose and character</b> of the use, including whether such use is of a <b>commercial nature or is for nonprofit educational</b> purposes;</li> <li>• The <b>nature</b> of the copyrighted work;</li> <li>• The <b>amount and substantiality of the portion used</b> in relation to the copyrighted work as a whole; and</li> <li>• The <b>effect of the use upon the potential market for or value of</b></li> </ul>	<p>The <b>most relevant fair use category is for research or scholarship</b>, and there is no limitation contained therein to scientific purposes</p> <p>The commercial nature of a use is a <b>factor</b> in the statutory fair use analysis, <b>but it is not determinative</b></p>	<p><u>Authors Guild Inc v Google Inc</u></p> <ul style="list-style-type: none"> <li>• At issue was whether Google's Library Project and Google Books project, which made digital copies of books to provide search functionality, infringed the copyright of the authors of published books included in the digital repository</li> <li>• The copyrighted subject matter at issue is <b>not explicitly connected to a scientific purpose</b></li> <li>• The search and snippet functions for the Library</li> </ul>	

			<p>the audio-visual work, and</p> <ul style="list-style-type: none"> <li>In a case where only part of the audio-visual item is copied <b>the amount and substantiality of the part copied</b> taken in relation to the whole item</li> </ul>	<p>dealing on the potential market for, or value of, the work are <b>factors</b> for determining whether the use constitutes fair dealing</p>		
New Zealand	<u>Copyright Act 1994</u> (at s.43 & s.43A)	<p>New Zealand law recognizes <b>fair dealing for works</b> used for the purpose of <b>research or private study</b>. The s.43 fair dealing exception is limited to <b>one copy of the source work</b>.</p>	<ul style="list-style-type: none"> <li>The <b>purpose</b> of the copying</li> <li>The <b>nature</b> of the work copied,</li> <li>The possibility of obtaining the work <b>within a reasonable time at an ordinary commercial price</b>,</li> <li>The <b>effect of the copying on the potential market for, or value of</b>, the work, and</li> <li>In a case where only part of the work is copied <b>the amount and substantiality of</b></li> </ul>	<p>The <b>most applicable fair dealing category</b> is for <b>research or study</b>, and there is no limitation contained therein to scientific purposes</p>	No relevant case law found	<p>S.43A provides that a reproduction <b>does not infringe copyright</b> if the reproduction is:</p> <ul style="list-style-type: none"> <li><b>Transient</b> or incidental;</li> <li>Is an <b>integral and essential part of a technological process</b> for making or receiving a communication that does not infringe copyright or enabling the lawful use of, or lawful</li> </ul>



			the part copied taken in relation to the whole item			dealing in, the work; and • Has no <b>independent economic significance</b>
Canada	<u>Copyright Act</u> (at s.29)	"Fair dealing for the purpose of <b>research</b> , private study, education, parody, or satire does not infringe copyright"	<ul style="list-style-type: none"> <li>• The <b>purpose</b> of the dealing,</li> <li>• The <b>character</b> of the dealing,</li> <li>• The <b>amount</b> of the dealing,</li> <li>• The <b>nature</b> of the work,</li> <li>• <b>Available alternatives</b> to the dealing, and</li> <li>• The <b>effect</b> of the dealing on the work</li> </ul>	The fair dealing exception for research can have broad applicability; however, it is <b>untested whether it captures informational analysis</b> . Various witnesses – including Element AI, BSA / The Software Alliance, and the Information Technology Association of Canada – have expressed support before the Standing Committee on Industry, Science, and Technology in favour of an explicit fair dealing exception for informational analysis	No relevant case law found	S.30.71 provides that it is not an infringement of copyright to make a reproduction of a work or other subject-matter if: <ul style="list-style-type: none"> <li>• The reproduction forms an <b>essential part of a technological process</b>;</li> <li>• The reproduction's <b>only purpose is to facilitate a use</b> that is not an infringement of copyright; and</li> <li>• The reproduction <b>exists only for the duration of the</b></li> </ul>

						<b>technological process.</b>
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Table 2A – Countries with an Explicit Legislative Exception for Text and Data Mining or Informational Analysis

Country	Source Law (Relevant Provisions; Date Introduced)	Permitted Reproductions	Limitations on Purpose of Reproduction	Communication, Distribution, and Storage Limitations	Contractual Override of Legislative Provisions and Attribution of Source Material
United Kingdom	<u>Copyright, Designs, and Patents Act</u> (at s.29A; 2014)	Copies are permitted for “anything recorded in the work”, subject to limitations on purpose	Copies are limited to <b>non-commercial research</b> purposes Note: ‘non-commercial research’ is not defined within the Act	S.29A(2) provides that it is <b>infringement</b> to transfer the copy: <ul style="list-style-type: none"> <li>Without authorization; or</li> <li>To sell or let for hire; or</li> <li>Offer or expose it for sale or hire</li> </ul> The <i>Copyright, Designs, and Patents Act</i> is silent on storage limitations	S.29A(5) provides that the TDM exception <b>cannot be overridden by contract</b>  The reproduction must be accompanied by a <b>sufficient acknowledgement</b> of the source material
Germany	<u>Act on Copyright and Related Rights</u> (at s.60d; 2017)	Copies are permitted for all source materials, subject to limitations on purpose	Copies are limited to <b>non-commercial</b> purposes that “enable the automatic analysis of large numbers of works for <b>scientific research</b> ” to create copies which can be analysed  Note: ‘non-commercial purpose’ is not defined within the Act	Sharing of copies extends only to “a specifically limited circle of persons for their <b>joint scientific research</b> [and for] <b>monitoring</b> the quality of scientific research”  Copies must be <b>deleted and can no longer be made available once the research work is completed</b> , but may be <b>transmitted</b> to libraries per s.60e and to archives,	The <i>Act on Copyright and Related Rights</i> is silent on contractual overrides and attribution.



				museums, and educational establishments per s.60f	
France	<u>Code de la Propriété Intellectuelle</u> , (at art. L. 122-5,10°; 2018), adopted via <u>Loi pour une république numérique</u> (at art. 38; 2016)	Copies are permitted for all <b>lawful</b> source materials, subject to limitations on purpose	Copies are limited to those associated with <b>scientific publications, for public research purposes, excluding all commercial purposes</b>	Preservation and communication of technical copies are subject to a <b>declaration</b> from the persons conducting text and data mining or informational analysis. <b>Any other copies or reproductions must be destroyed</b>	The <i>Code de la Propriété Intellectuelle</i> is silent on contractual overrides and attribution
Japan	<u>Copyright Law of Japan</u> (at Article 47septies; 2009)	Copies are permitted for all source materials, subject to limitations on purpose	Copying is limited to the <b>extent necessary in the circumstances</b> .  Copying is permitted for <b>both commercial and non-commercial</b> use	The <i>Copyright Law of Japan</i> is silent on communication, distribution, and storage limitations	The <i>Copyright Law of Japan</i> is silent on contractual overrides.  Article 48(1) provides that the source of a reproduction <b>must be clearly indicated in the manner and to the extent deemed reasonable</b> by the form of the reproduction or exploitation
European Union	<i>DSM Draft Directive</i> (introduced in 2018, currently subject to	Copies are permitted for <b>lawfully accessed</b> works, subject to limitations on purpose	Copying is limited to <b>research organisations conducting scientific research</b>	The <i>DSM Draft Directive</i> suggests an exception that permits <b>storage and communication</b> of copies	The TDM exception proposed <b>cannot be overridden by contract</b>  The <i>DSM Draft Directive</i> is silent on attribution

**Commented [CD1]:** NTD: while **not applicable** to the task at hand, the EU's definitions for 'research and innovation actions', 'research infrastructure', and 'research infrastructure actions' can be found [here](#) for the EU's Horizon 2020 programme



	ongoing discussion)		<b>Note: 'research organization' is not defined within the Act</b>  <b>Copying is permitted for both commercial and non-commercial use</b>		
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**Table 2B – Countries with an Explicit Legislative Exception for Text and Data Mining or Informational Analysis (Cheat Sheet)**

Country	Is there Explicit Language on Lawfully Accessing Source Material?	Is the Exception Limited to Non-Commercial Purposes?	Is the Exception Limited to Research Purposes?	Is the Exception Limited to Scientific Purposes?	Are there Limitations on the Communication or Distribution of Copies?	Are there Limitations on the Storage of Copies?	Can the TDM Exception be Overridden by Contract?	Is Attribution of Source Material Required?
United Kingdom	X	✓	✓	X	✓	--	X	✓
Germany	X	✓	✓	✓	✓	✓	--	--
France	✓	✓	✓	✓	✓	✓	--	--
Japan	X	X	X	X	--	--	--	✓
European Union	✓	X	✓	✓	X	X	X	--

Legend	
Yes	✓
No	X
Silent on Matter	--

# Artificial Intelligence: the gift of fire!

Friday, June 7, 2019 — Robert Crampton

Check out the fascinating glimpse of what we'll be discussing at the Artificial Intelligence (AI) Symposium we're having on **June 19, 2019**. The intro below was written by PCH's own Johnny El-Alam. Johnny is one of a number of AI users and specialists we have at the department.

Thank you!

Robert...

This year's Montreal Digital Spring events featured a number of AI presentations which confirmed that we're not on the cusp of an AI Neo-Industrial Revolution; but rather, we're in the thick of it! It is important to note that AI is not one thing or one system. Ever since the academic discipline of AI was established in 1956, the definition of AI has been constantly evolving and branching-out into a variety of sub-disciplines producing isolated technologies ranging from problem solving to machine vision and natural language processing. But if we were to overly simplify things, AI can be defined as a scientific and technological quest that enables machines to think (informatics) and act (robotics) intelligently. "**Narrow**" AI systems like GPS navigation can outperform humans in tasks that are limited in scope but these systems remain inferior to the multitasking human intelligence. If AI systems were to surpass broad human and animal intelligence, they would be labeled "**General**" AI, and we would reach the state of "**Singularity**" if an AI system develops **self-awareness** and ventures into a continuous better AI production cycle. We're not there yet; however, the fact that the past four years alone have witnessed the registration of more than 50% of all-time AI inventions is an alarming exponential growth.

So far, the AI revolution has not taken the shape of dystopic science-fiction **Terminator**-style movies; more serene ethical reflections on advancing computer technologies compare AI to Prometheus' "**gift of fire**": an enormous source of empowerment to humans that carries equal risks and needs to be handled with utter care. Today, scholars, public figures and governments are grappling with the issue of properly governing the increasing power of AI systems and the challenges they pose as well as making sure they are **used for the betterment of societies**.

The Government of Canada, including our department, are at the forefront of these efforts. It is the imminence of these issues that makes it important for us to make sure that everyone at PCH is aware of the upcoming AI-challenges and informed about our respective initiatives. The upcoming series of lectures organized by the Beyond 2020 team at PCH is exactly meant to bring the entire PCH department up to speed on our AI quests. We are doing some exciting things and we look forward to engaging with as many of you during the inaugural session.

## Artificial Intelligence (AI) Symposium

**When:** June 19, 1:30 pm to 3 pm

**Where:** 15 Eddy, 13th Floor, Room 416

**Cost:** Free

**Brought to you by:** Beyond 2020 and GenerAction

# AI in Government now! How to hire your own AI agent!

September 18, 2019

Our first Canadian Heritage Beyond 2020 panel on Artificial Intelligence (AI), held on June 19, 2019, broadly explored the questions: “What is AI?” and “What are some of its anticipated implications on the creative sector and government processes?” We were so pleased with the interest across the department! Over 60 people squashed into the big boardroom or watched on WebEx!

Our **second panel will be held on September 30**, and will introduce policy questions, as well as actual AI projects and tools created by colleagues at Canadian Heritage (PCH), the National Research Council (NRC), and the Treasury Board Secretariat (TBS). Can AI create an artwork? Can you hire an AI agent for your next project?

- Saif Mouhammad, who works at the National Research Council, is an established AI researcher who will be introducing the work of his team and focusing on his **AI experiments in Music and in Museum environments**.
- Johnny El-Alam and Pierre-Luc Purtell (PCH) will introduce the AI policy work of **PCH's Creative Marketplace Lab on Data, Skills, and Technology** as well as that of the **Copyright teams**.
- Finally, Benoit Deshaies, a Senior Advisor at the Office of the CIO of the Treasury Board Secretariat of Canada, will introduce the **Directive on Automated Decision-Making**, the Algorithmic Impact Assessment tool and the AI procurement Source List.

It promises to be very exciting! A real look into the **future** that is **happening now!**

**Date:** Monday, September 30, 2019

**Where:** Auditorium, 3rd floor of 15 Eddy St.

**When:** 1:30 pm to 3:30 pm

I hope you will all be able to join us for this free event!

Our presenters should be able to answer any burning AI questions you have!

Looking forward to seeing you there!!!

Robert Crampton  
Champion

Beyond  
Au-delà de 2020

## Back to the Future (of AI)

The first two Beyond 2020 @ PCH panels explored the nature of AI technology and how it is being researched, procured and deployed within the Government of Canada. Our speakers highlighted the magnitude (this changes everything) and speed (much faster than you think) of disruption ushered by recent advancements in AI. Such circumstances posit a tough challenge for policymakers. But fear not. Our third panel is also composed of pioneers in the field of AI policy who have been working on an international scale and who will be sharing their knowledge, insights, and highlights of Canadian AI policy.

Joining us from Policy Horizons Canada, Steffen Christensen will be revealing the crystal ball through which he sees the future (also known as the cone of plausibility) and what it holds for Human-AI relationships. Working between the Privy Council Office of Canada and Global Affairs Canada, Philippe-Andre Rodriguez will highlight the Digital Inclusion Lab's work on AI policy, at home and abroad. This will set the stage for Allison O'Beirne from Innovation, Science and Economic Development Canada to inform us about the efforts of the "Artificial Intelligence Hub" to launch the Global Partnership on AI and the Advisory Council on AI.

As we are anticipating more attendees for this round kindly reserve your in-person or virtual spot by sending us an email to [pch.au-delade2020-beyond2020.pch@canada.ca](mailto:pch.au-delade2020-beyond2020.pch@canada.ca)

## Retour vers le futur (de l'IA)

Les deux premiers panels Au-delà de 2020 @ PCH ont exploré la nature de la technologie d'intelligence artificielle et ses méthodes de recherche, d'acquisitions et de déploiement au sein du gouvernement du Canada. Nos orateurs ont souligné la magnitude (cela change tout) et la vitesse (beaucoup plus rapidement que vous ne le pensez) des perturbations engendrées par les récents progrès de l'IA. De telles circonstances posent un défi difficile aux analystes. Mais n'ayez crainte. Notre troisième groupe est également composé de pionniers dans le domaine de la politique de l'IA qui ont travaillé à l'échelle internationale et qui partageront leurs connaissances, leurs points de vue et les points saillants de la politique canadienne en matière d'IA.

Steffen Christensen, de Horizons de politiques Canada, nous dévoilera la boule de cristal à travers laquelle il voit l'avenir (aussi connu sous le nom « *cone of plausibility* » ) et ce qu'il vaut pour les relations entre l'homme et l'IA. Travaillant entre le Bureau du Conseil privé du Canada et Affaires mondiales Canada, Philippe-André Rodriguez démontrera le travail du « *Digital Inclusion Lab* » sur la politique de l'IA, chez nous et à l'étranger. Cela permettra à Allison O'Beirne d'Innovation, Sciences et Développement économique Canada de nous informer des efforts déployés par le « Centre d'information artificielle » pour lancer le Partenariat mondial sur l'IA et le Conseil consultatif sur l'IA.

Comme nous prévoyons plus de participants à cette occasion, veuillez réserver votre place en personne ou virtuelle en nous envoyant un courrier électronique à l'adresse [pch.au-delade2020-beyond2020.pch@canada.ca](mailto:pch.au-delade2020-beyond2020.pch@canada.ca)

## Back to the Future (of AI)

The first two Beyond 2020 @ PCH panels explored the nature of AI technology and how it is being researched, procured and deployed within the Government of Canada. Our speakers highlighted the magnitude (this changes everything) and speed (much faster than you think) of disruption ushered by recent advancements in AI. Such circumstances posit a tough challenge for policymakers. But fear not. Our third panel is also composed of pioneers in the field of AI policy who have been working on an international scale.

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As we are anticipating more attendees for this round (Santa has already RSVP'ed; he's contemplating the use of AI for toy-making and naughty-or-nice-list automation), kindly reserve your in-person or virtual spot by sending us an email at [X@y.com](mailto:X@y.com).

Note: please avoid any interaction with the elves' picket lines in front of the building.

## Want to hire an AI agent?

Our first Canadian Heritage Beyond 2020 panel on Artificial Intelligence (AI), held on June 19, 2019, broadly explored the questions: "What is AI?" and "What are some of its anticipated implications on the creative sector and government processes?". We were so pleased with the interest across the department! Over 60 people squashed into the big boardroom or watched on Web Ex!

**Can AI feel? Can it create an artwork? Can you hire an AI agent?** Our second panel, to be held on September 30 (1 p.m. to 3 p.m.), will be introducing actual AI projects, tools, and policy questions created by our fellow Government of Canada colleagues at the National Research Council (NRC), Canadian Heritage (PCH), and the Treasury Board of Canada (TBS).

Saif Mouhammad, who works at the National Research Council, is an established AI researcher who will be introducing the work of his team and focusing on his AI experiments in Music and in Museum environments.

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Benoit Deshaies, a Senior Advisor at the Office of the CIO of the Treasury Board of Canada, will be introducing the *Directive on Automated Decision-Making*, the Algorithmic Impact Assessment tool and the AI procurement Source List.

It promises to be very exciting! A real look into the future that is happening now!

I hope you will all be able to join us for this free event in the Auditorium 15 Eddy, 3<sup>rd</sup> Floor.

Our room is bigger! Our speakers are hyped! And our topic is cutting edge!

Below, you'll find short bios of our presenters. Together, they should be able to answer any burning AI questions you have! And we hope you'll bring lots of questions! We've set aside the time to take them!

Looking forward to seeing you there!!!

### Bios:

**Dr. Saif M. Mohammad** is Senior Research Scientist at the National Research Council Canada (NRC). He received his Ph.D. in Computer Science from the University of Toronto. Before joining NRC, Saif was a Research Associate at the Institute of Advanced Computer Studies at the University of Maryland, College Park. His research interests are in Emotion and Sentiment Analysis, Computational Creativity, Psycholinguistics, Fairness in Language, and Information Visualization. Saif has served as General Chair for the Canada-UK Symposium on Ethics in AI, co-chair of SemEval (the largest platform for semantic evaluations), and co-organizer of WASSA (a sentiment analysis workshop). He has also served as the area chair for ACL, NAACL, and EMNLP in Sentiment Analysis and Fairness and Bias in NLP. His work on emotions has garnered media attention, with articles in Time, Washington Post, Slashdot, LiveScience, The Physics arXiv Blog, PC World, Popular Science, etc. Webpage: <http://saifmohammad.com>

**Dr. Johnny El-Alam** is a Research and Policy Analyst at the Creative Marketplace Lab for Skills, Data, and Technology. He holds a PhD in Cultural Mediations (Visual Culture), Masters in Art History, *Diplômes d'études supérieures spécialisées* and Bachelors of Fine Arts in applied arts, and a Bachelors in History. Johnny has won several awards for his research and productions. He is a certified digital imaging expert with a record of accomplishment in teaching Adobe creative software at artist-run-centres, colleges, and universities.

**Pierre-Luc Purtell** is a Policy Analyst in the Broadcasting, Copyright and Creative Marketplace at Canadian Heritage. He holds a Bachelor of Civil Law (B.C.L) and Bachelor of Laws (LL.B) from McGill University. He previously worked as an analyst for American Express and the Center for Intellectual Property Policy.

**Benoit Deshaies** is a Senior Advisor at the Office of the CIO of the Treasury Board of Canada Secretariat. He studied computer science at Carleton University in Ottawa. Starting his career in Kanata's telecom industry, he then joined the government to help modernize services to the web. He honed his understanding of data analysis building software sorting through large datasets to detect fraud. He now leads TBS' efforts around the responsible use of AI and directs the development of the Directive on Automated Decision-Making and the Algorithmic Impact Assessment (AIA).



## Annexes

### Annex A – Countries with an Explicit Legislative Exception for Text and Data Mining or Informational Analysis

Country	Source Law (Relevant Provisions; Date Introduced)	Permitted Reproductions	Limitations on Purpose of Reproduction	Communication, Distribution, and Storage Limitations	Contractual Override of Legislative Provisions and Attribution of Source Material
United Kingdom	<i>Copyright, Designs, and Patents Act</i> (at s.29A; 2014)	Copies are permitted for “anything recorded in the work”, subject to limitations on purpose	Copies are limited to <b>non-commercial research</b> purposes Note: ‘non-commercial research’ is not defined within the Act	S.29A(2) provides that it is <b>infringement</b> to transfer the copy: <ul style="list-style-type: none"> <li>Without authorization; or</li> <li>To sell or let for hire; or</li> <li>Offer or expose it for sale or hire</li> </ul> The <i>Copyright, Designs, and Patents Act</i> is silent on storage limitations	S.29A(5) provides that the TDM exception <b>cannot be overridden by contract</b>  The reproduction must be accompanied by a <b>sufficient acknowledgement</b> of the source material
Germany	<i>Act on Copyright and Related Rights</i> (at s.60d; 2017)	Copies are permitted for all source materials, subject to limitations on purpose	Copies are limited to <b>non-commercial</b> purposes that “enable the automatic analysis of large numbers of works for <b>scientific research</b> ” to create copies which can be analysed	Sharing of copies extends only to “a specifically limited circle of persons for their <b>joint scientific research</b> [and for] <b>monitoring</b> the quality of scientific research”  Copies must be <b>deleted and can no longer be made available once the research work is completed</b> , but may be <b>transmitted</b> to libraries per s.60e and to archives,	The <i>Act on Copyright and Related Rights</i> is silent on contractual overrides and attribution.

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			Note: 'non-commercial purpose' is not defined within the Act	museums, and educational establishments per s.60f	
France	<u>Code de la Propriété Intellectuelle</u> , (at art. L. 122-5,10°; 2018), adopted via <u>Loi pour une république numérique</u> (at art. 38; 2016)	Copies are permitted for all <b>lawful</b> source materials, subject to limitations on purpose	Copies are limited to those associated with <b>scientific publications, for public research purposes, excluding all commercial purposes</b>	Preservation and communication of technical copies are subject to a <b>declaration</b> from the persons conducting text and data mining or informational analysis. <b>Any other copies or reproductions must be destroyed</b>	The <i>Code de la Propriété Intellectuelle</i> is silent on contractual overrides and attribution
Japan	<u>Copyright Law of Japan</u> (at Article 47septies; 2009)	Copies are permitted for all source materials, subject to limitations on purpose	Copying is limited to the <b>extent necessary in the circumstances</b> .  Copying is permitted for <b>both commercial and non-commercial</b> use	The <i>Copyright Law of Japan</i> is silent on communication, distribution, and storage limitations	The <i>Copyright Law of Japan</i> is silent on contractual overrides.  Article 48(1) provides that the source of a reproduction <b>must be clearly indicated in the manner and to the extent deemed reasonable</b> by the form of the reproduction or exploitation
European Union	<i>DSM Draft Directive</i> (introduced in 2018, currently subject to	Copies are permitted for <b>lawfully accessed</b> works, subject to limitations on purpose	Copying is limited to <b>research organisations conducting scientific research</b>	The <i>DSM Draft Directive</i> suggests an exception that permits <b>storage and communication</b> of copies	The TDM exception proposed <b>cannot be overridden by contract</b>

Field Code Changed

Field Code Changed

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	ongoing discussion)		Note: 'research organization' is not defined within the Act  Copying is permitted for <b>both commercial and non-commercial</b> use		The <i>DSM Draft Directive</i> is silent on attribution
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February-March 143, 2019

Annex B – Countries with a General Fair Dealing or Fair Use Legislative Exception that may Permit Text and Data Mining or Informational Analysis

Country	Source of Law (Relevant Provisions)	Nature of Exception	Test Factors	Applicability to Text and Data Mining or Informational Analysis	Relevant Case Law	Other Relevant Exceptions
USA	<u>US Code: Title 17 - Copyrights</u> (at s.107)	The fair use exception provides that “the fair use of a copyrighted work... for purposes such as... <b>scholarship, or research</b> , is not an infringement of copyright.”	<ul style="list-style-type: none"> <li>• The <b>purpose and character</b> of the use, including whether such use is of a <b>commercial nature or is for nonprofit educational purposes</b>;</li> <li>• The <b>nature</b> of the copyrighted work;</li> <li>• The <b>amount and substantiality of the portion used</b> in relation to the copyrighted work as a whole; and</li> <li>• The <b>effect of the use upon the potential market for or value of the copyrighted work</b>.</li> </ul>	<p>The <b>most relevant fair use category is for research or scholarship</b>, and there is no limitation contained therein to scientific purposes</p> <p>The commercial nature of a use is a <b>factor</b> in the statutory fair use analysis, <b>but it is not determinative</b></p>	<p><u>Authors Guild Inc v Google Inc</u></p> <ul style="list-style-type: none"> <li>• <u>At issue was whether Google’s Library Project and Google Books project, which made digital copies of books to provide search functionality, infringed the copyright of the authors of published books included in the digital repository</u></li> <li>• The copyrighted subject matter at issue is <b>not explicitly connected to a scientific purpose</b></li> <li>• The search and snippet functions for the Library Project and Google</li> </ul>	

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					Books project are available <b>without charge and without advertising</b> , but Google does <b>gain a commercial advantage indirectly</b> because the projects contribute to their presence in the world-wide Internet search market	
Australia	<u>Copyright Act 1968</u> (at s.103C)	Australian law recognizes <b>fair dealing for audio-visual works</b> used for the purpose of <b>research or study</b> .	<ul style="list-style-type: none"> <li>• The <b>purpose and character</b> of the dealing,</li> <li>• The <b>nature</b> of the audio-visual item,</li> <li>• The possibility of obtaining the audio-visual item <b>within a reasonable time at an ordinary commercial price</b>,</li> <li>• The <b>effect of the dealing on the potential market for, or value of</b>, the audio-visual work, and</li> </ul>	<p>The <b>most applicable fair dealing category is for research or study</b>, and there is no limitation contained therein to scientific purposes</p> <p>The <b>commercial nature</b> of the dealing is <b>not determinative</b>, but the purpose and character of the dealing, the possibility of obtaining the work within a reasonable time at an ordinary commercial price, and the effect of the dealing on the</p>	No relevant case law found	



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			<ul style="list-style-type: none"> <li>In a case where only part of the audio-visual item is copied <b>the amount and substantiality of the part copied</b> taken in relation to the whole item</li> </ul>	potential market for, or value of, the work are <b>factors</b> for determining whether the use constitutes fair dealing		
New Zealand	<u>Copyright Act 1994</u> (at s.43 & s.43A)	New Zealand law recognizes <b>fair dealing for works</b> used for the purpose of <b>research or private study</b> . The s.43 fair dealing exception is limited to <b>one copy of the source work</b> .	<ul style="list-style-type: none"> <li>The <b>purpose</b> of the copying</li> <li>The <b>nature</b> of the work copied,</li> <li>The possibility of obtaining the work <b>within a reasonable time at an ordinary commercial price</b>,</li> <li>The <b>effect of the copying on the potential market for, or value of, the work</b>, and</li> <li>In a case where only part of the work is copied <b>the amount and substantiality of the part copied</b> taken in relation</li> </ul>	The <b>most applicable fair dealing category is for research or study</b> , and there is no limitation contained therein to scientific purposes	No relevant case law found	S.43A provides that a reproduction <b>does not infringe copyright</b> if the reproduction is: <ul style="list-style-type: none"> <li><b>Transient</b> or incidental;</li> <li>Is an <b>integral and essential part of a technological process</b> for making or receiving a communication that does not infringe copyright or enabling the lawful use of, or lawful dealing in, the work; and</li> </ul>

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			to the whole item			<ul style="list-style-type: none"> <li>Has no independent economic significance</li> </ul>
Canada	<u>Copyright Act</u> (at s.29)	"Fair dealing for the purpose of <b>research</b> , private study, education, parody, or satire does not infringe copyright"	<ul style="list-style-type: none"> <li>The <b>purpose</b> of the dealing,</li> <li>The <b>character</b> of the dealing,</li> <li>The <b>amount</b> of the dealing,</li> <li>The <b>nature</b> of the work,</li> <li><b>Available alternatives</b> to the dealing, and</li> <li>The <b>effect</b> of the dealing on the work</li> </ul>	The fair dealing exception for research can have broad applicability; however, it is <b>untested whether it captures informational analysis</b> . Various witnesses – including Element AI, BSA / The Software Alliance, and the Information Technology Association of Canada – have expressed support before the Standing Committee on Industry, Science, and Technology in favour of an explicit fair dealing exception for informational analysis	No relevant case law found	S.30.71 provides that it is not an infringement of copyright to make a reproduction of a work or other subject-matter if: <ul style="list-style-type: none"> <li>The reproduction forms an <b>essential part of a technological process</b>;</li> <li>The reproduction's <b>only purpose is to facilitate a use</b> that is not an infringement of copyright; and</li> <li>The reproduction <b>exists only for the duration of the</b></li> </ul>

| Copyright Policy

February-March 143, 2019

						technological process.
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## Voulez-vous embaucher une IA?

Notre premier panel sur l'intelligence artificielle (IA) de Patrimoine canadien Au-delà de 2020, tenu le 19 juin 2019, a largement exploré les questions suivantes: «Qu'est-ce que l'IA?» Et «Quelles sont certaines de ses implications anticipées sur le secteur de la création et les processus gouvernementaux? Nous avons été très satisfaits de l'intérêt manifesté dans tout le ministère! Plus de 60 personnes se sont écrasées dans la grande salle de conférence ou ont regardé Web Ex!

Field Code Changed

**L'IA peut-elle se sentir? Peut-il créer une oeuvre d'art? Pouvez-vous embaucher un agent AI?** Notre deuxième panel, qui se tiendra le 30 septembre (de 13 h à 15 h), présentera des projets, des outils et des questions de politique sur l'IA créés par nos collègues du gouvernement du Canada au sein du Conseil national de recherches (CNRC), Patrimoine canadien (PCH) et le Conseil du Trésor du Canada (SCT).

Saif Mouhammad, qui travaille au Conseil national de la recherche, est un chercheur expérimenté dans le domaine de l'IA. Il présentera les travaux de son équipe et se concentrera sur ses expériences d'IA en musique et en environnement muséal.

Johnny El-Alam et Pierre-Luc Purtell (PCH) présenteront les travaux sur les politiques d'intelligence artificielle du Laboratoire de marché créatif sur les données, les compétences et la technologie, ainsi que ceux des équipes de droit d'auteur.

Enfin, Benoit Deshaies, conseiller principal au Bureau du dirigeant principal de l'information du Conseil du Trésor du Canada, présentera la Directive sur la prise de décision automatisée, l'outil d'évaluation de l'impact algorithmique et la liste des sources d'approvisionnement en IA.

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Au plaisir de vous y voir !!!

Bios:

**Dr. Saif M. Mohammad** est chercheur principal au Conseil national de recherches Canada (CNRC). Il a reçu son doctorat en informatique de l'Université de Toronto. Avant de rejoindre le CNRC, Saif était associé de recherche à l'Institute of Advanced Computer Studies de l'Université du Maryland, College Park. Ses recherches portent sur l'analyse des émotions et des sentiments, la créativité informatique, la psycholinguistique, l'équité linguistique et la visualisation de l'information. Saif a été président général

du Symposium canado-britannique sur l'éthique en matière d'intelligence artificielle, coprésident de SemEval (la plus grande plateforme d'évaluation sémantique) et coorganisateur de WASSA (atelier d'analyse des sentiments). Il a également été président régional d'ACL, de NAACL et d'EMNLP pour l'analyse des sentiments, l'équité et les préjugés dans la PNL. Ses travaux sur les émotions ont attiré l'attention des médias, notamment dans Time, Washington Post, Slashdot, LiveScience, le blog arXiv Physics, PC World, Popular Science, etc. Page Web: <http://saifmohammad.com>

**Dr. Johnny El-Alam** est analyste de la recherche et des politiques au Laboratoire de marché créatif sur les données, les compétences et la technologie. Il est titulaire d'un doctorat en médiations culturelles (culture visuelle), d'une maîtrise en histoire de l'art, de diplômes d'études supérieures spécialisées et d'un baccalauréat en beaux-arts en arts appliqués et d'un baccalauréat en histoire. Johnny a remporté plusieurs prix pour ses recherches et ses productions. Il est un expert certifié en imagerie numérique et a acquis une expérience remarquable dans l'enseignement des logiciels de création Adobe dans les centres d'artistes autogérés, les collèges et les universités.

**Pierre-Luc Purtell** est analyste des politiques sur le marché de la radiodiffusion, du droit d'auteur et de la création de Patrimoine canadien. Il est titulaire d'un baccalauréat en droit civil (B.C.L.) et d'un baccalauréat en droit (LL.B) de l'Université McGill. Auparavant, il a travaillé en tant qu'analyste chez American Express et au ~~Center for Intellectual Property Policy~~ Centre des politiques en propriété intellectuelle.

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**Benoit Deshaies** est conseiller principal au Bureau du DPI du Secrétariat du Conseil du Trésor du Canada. Il a étudié l'informatique à l'Université Carleton à Ottawa. Il a débuté sa carrière dans l'industrie des télécommunications à Kanata, puis a rejoint le gouvernement pour aider à moderniser les services Web. Il a affiné sa compréhension du logiciel de création d'analyses de données, consistant à trier de grands ensembles de données pour détecter les fraudes. Il dirige maintenant les efforts du SCT en faveur d'une utilisation responsable de l'IA et dirige l'élaboration de la Directive sur la prise de décision automatisée et l'évaluation de l'impact algorithmique (AIA).

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HOUSE OF COMMONS  
CHAMBRE DES COMMUNES  
CANADA

# STATUTORY REVIEW OF THE COPYRIGHT ACT

Report of the Standing Committee on Industry, Science  
and Technology

Dan Ruimy, Chair

JUNE 2019  
42<sup>nd</sup> PARLIAMENT, 1<sup>st</sup> SESSION

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# **STATUTORY REVIEW OF THE COPYRIGHT ACT**

## **Report of the Standing Committee on Industry, Science and Technology**

**Dan Ruimy  
Chair**

**JUNE 2019**

**42<sup>nd</sup> PARLIAMENT, 1<sup>st</sup> SESSION**

## **NOTICE TO READER**

### **Reports from committee presented to the House of Commons**

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

To assist the reader:

A list of abbreviations used in this report is available on page xv



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Dan Ruimy

## **VICE-CHAIRS**

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Brian Masse

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David de Burgh Graham

Richard Hébert (Parliamentary Secretary — Non-Voting Member)

Majid Jowhari

Dane Lloyd

Alaina Lockhart (Parliamentary Secretary — Non-Voting Member)

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Rémi Massé (Parliamentary Secretary — Non-Voting Member)

John Oliver

Marc Serré (Parliamentary Secretary — Non-Voting Member)

Terry Sheehan

Kate Young (Parliamentary Secretary — Non-Voting Member)

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Vance Badawey

Hon. Larry Bagnell

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Sarah Lemelin-Bellerose, Analyst

Francis Lord, Analyst

Maxime-Olivier Thibodeau, Analyst

Jean Dupuis, Research Assistant

# **THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY**

has the honour to present its

## **SIXTEENTH REPORT**

Pursuant to the Order of Reference of Wednesday, December 13, 2017, the Committee has reviewed the *Copyright Act* and has agreed to report the following:

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## CHAIR'S FOREWORD

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In December 2017, the House of Commons entrusted its Standing Committee on Industry, Science and Technology with the statutory review of the *Copyright Act*. The importance of this Act is unquestionable: as the Honourable Navdeep Bains and the Honourable Mélanie Joly said in their letter to the Committee, while “often underappreciated, the *Copyright Act* impacts Canadians every day, shaping what we see and hear, and enhancing our systems for the creation and use of content.” The Ministers also emphasized that, given the wide range of industries and activities it affects, the Act and its application are notoriously complex. It was clear to the members of the Committee that reviewing the Act would be no easy task.

To manage the complexity of the task at hand, the Committee elected to conduct, as its members called it, a “living and grounded” review of the Act. The review would thus progress from the ground up, allowing witnesses to set its agenda by raising the issues that concerned them while remaining flexible enough to accommodate evolving interests and concerns. The Committee began by hearing witnesses representing specific industries and sectors of activity, moved gradually to witnesses involved in multiple industries and sectors of activities, such as interest groups and Indigenous witnesses, and concluded the review with academics and legal experts who could speak broadly about the Act and comment previous testimony. For over a year, the review was this Committee’s main endeavour.

As Chair, my main concern was to make sure that the review would be informed by as many different perspectives as possible. Committee members were encouraged to ask all manner of questions to better understand the impact copyright law has on Canada’s modern economy and Canadian creators, even though such questions often led to difficult discussions. We did not presume what the outcome of this lengthy and complex undertaking would bring, only that the Committee would give anyone the opportunity to present oral or written evidence. I am honoured to have witnessed such an important and thoughtful conversation.

This report is the culmination of hundreds of oral and written testimonies, to which the Committee responds with observations and recommendations. I thank all the members who sat on the Committee during its public hearings and contributed to its deliberations, as well as the dedicated individuals who tirelessly supported their work. Most of all, I am grateful to all who took the time and the resources to provide testimony on such an important matter.



## LIST OF ABBREVIATIONS

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ABPBC	Association of Book Publishers of British Columbia
ACAD	Alberta College of Art and Design
ACP	Association of Canadian Publishers
ACTRA	Alliance of Canadian Cinema, Television and Radio Artists
ADAC	Art Dealers Association of Canada
ADISQ	Association québécoise de l'industrie du disque, du spectacle et de la vidéo
AI	Artificial intelligence
ALAC	Artists and Lawyers for the Advancement of Creativity
AMBP	Association of Manitoba Book Publishers
AMII	Alberta Machine Intelligence Institute
ANEL	Association nationale des éditeurs de livres
ANSUT	Association of Nova Scotia University Teachers
AQED	Association québécoise pour l'éducation à domicile
AQPM	Association québécoise de la production médiatique
ARIN	American Registry for Internet Numbers
ARR	Artist's resale right
ARRQ	Association des réalisateurs et réalisatrices du Québec
BAnQ	Bibliothèque et Archives nationales du Québec
BCBC	Business Coalition for Balanced Copyright
BCLA	British Columbia Library Association
CAA	Canadian Authors Association

CAB	Canadian Association of Broadcasters
CACN	Canadian Anti-Counterfeiting Network
CALJ	Canadian Association of Learned Journals
CALL	Canadian Association of Law Libraries
CAPIC	Canadian Association of Professional Image Creators
CARFAC	Canadian Artists' Representation
CARL	Canadian Association of Research Libraries
CASA	Canadian Alliance of Student Associations
CAUL	Council of Atlantic University Libraries
CAUT	Canadian Association of University Teachers
CBA	Canadian Bar Association
CBC	Canadian Broadcasting Corporation
CCA	Canadian Council of Archives
CaCC	Canadian Chamber of Commerce
CrCC	Creative Commons Canada
CCD	Council of Canadians with Disabilities
CCI	Canadian Copyright Institute
CCM	Coalition for Culture and Media
CCP	Cultural Capital Project
CDPA	<i>Copyright, Designs and Patents Act 1988 (UK)</i>
CFLA	Canadian Federation of Library Associations
CFM	Canadian Federation of Musicians
CFS	Canadian Federation of Students
CHPC	House of Commons Standing Committee on Canadian Heritage

CIC	Colleges and Institutes Canada
CIMA	Canadian Independent Music Association
CIPPIC	Canadian Internet Policy and Public Interest Clinic
CMA	Copyright Modernization Act
CMRRA	Canadian Musical Reproduction Rights Agency
CMEC	Council of Ministers of Education, Canada
CMePA	Canadian Media Producers Association
CMuPA	Canadian Music Publishers Association
CNIB	Canadian National Institute for the Blind
CNOC	Canadian Network Operators Consortium
CPC	Canadian Publishers Council
CPCC	Canadian Private Copying Collective
CPHSS	Canadian Publishers Hosted Software Solutions
CPSLDBC	Council of Post-Secondary Library Directors of British Columbia
CRKN	Canadian Research Knowledge Network
CRTC	Canadian Radio-television and Telecommunications Commission
CSBA	Canadian School Boards Association
CSC	Campus Stores Canada
CSCAIP	Canadian Society of Children's Authors, Illustrators and Performers
CTA	Consumer Technology Association
CTF	Canadian Teachers' Federation
CULC	Canadian Urban Libraries Council
CUSMA	Canadian–United States–Mexico Agreement
CVA	Copyright Visual Arts

DCH	Department of Canadian Heritage
DFA	Dalhousie Faculty Association
DGC	Directors Guild of Canada
ECUAD	Emily Carr University of Art and Design
FCM	Federation of Canadian Municipalities
FNC	Fédération nationale des communications
GMMQ	Guilde des musiciens et musiciennes du Québec
HAC	Hotel Association of Canada
HAP	House of Anansi Press/Groundwoor Books
IATSE	International Alliance of Theatrical Stage Employees
ICMI	Indigenous Culture and Media Innovations
ICSAC	International Confederation of Societies of Authors and Composers
IFLAI	International Federation of Library Associations and Institutions
IFRRO	International Federation of Reproduction Rights Organisations
INDU	House of Commons Standing Committee on Industry, Science and Technology
IPIC	Intellectual Property Institute of Canada
IPU	International Publishers Association
ISED	Department of Innovation, Science and Economic Development
ISP(s)	Internet service provider(s)
LMAs	Libraries, archives and museums
MMF	Manitoba Metis Federation Inc.
MPAC	Motion Picture Association-Canada
MRFHG	Maple Ridge Family History Group

MRU	Mount Royal University
MTAC	Movie Theatre Association of Canada
NCCRA	National Campus and Community Radio Association
NCTR	National Centre for Truth and Reconciliation
NMC	News Media Canada
OBPO	Ontario Book Publishers Organization
OMM	ole Media Management
OSP(s)	Online service provider(s)
OTW	Organization for Transformative Works
PGC	Playwrights Guild of Canada
PIAC	Public Interest Advocacy Centre
PMPA	Professional Music Publishers Association
PPC	Professional Photographers of Canada
PWAC	Professional Writers Association of Canada
QLA	Quebec Library Association
RAAVQ	Regroupement des artistes en arts visuels du Québec
RSU	Ryerson Students' Union
SACD	Société des auteurs et compositeurs dramatiques
SAIT	Southern Alberta Institute of Technology
SARTEC	Société des auteurs de radio, télévision et cinéma
SCAM	Société civile des auteurs multimedia
SCC	Supreme Court of Canada
SCGC	Screen Composers Guild of Canada
SFU	Simon Fraser University

<b>SNE</b>	<b>Syndicat national de l'édition</b>
<b>SOCAN</b>	<b>Society of Composers, Authors and Music Publishers of Canada</b>
<b>SODRAC</b>	<b>Society for Reproduction Rights of Authors, Composers and Publishers in Canada</b>
<b>SPACQ</b>	<b>Société professionnelle des auteurs et des compositeurs du Québec</b>
<b>TPM(s)</b>	<b>Technology protection measure(s)</b>
<b>TSM</b>	<b>Third Side Music Inc.</b>
<b>UBC</b>	<b>University of British Columbia</b>
<b>UCRIU</b>	<b>Undergraduates of Canadian Research-Intensive Universities</b>
<b>UEQ</b>	<b>Union Étudiante du Québec</b>
<b>UNB</b>	<b>University of New Brunswick</b>
<b>UNEQ</b>	<b>Union des écrivaines et des écrivains du Québec</b>
<b>UK</b>	<b>United Kingdom</b>
<b>US</b>	<b>United States</b>
<b>WAC</b>	<b>Winnipeg Arts Council</b>
<b>WGC</b>	<b>Writers Guild of Canada</b>
<b>WSD</b>	<b>Winnipeg School Division No 1</b>
<b>WUC</b>	<b>Writers' Union of Canada</b>

## SUMMARY

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Section 92 of the *Copyright Act* (the Act) provides that the Act must be reviewed every five years by a parliamentary committee. On 13 December 2017, the House of Commons designated its Standing Committee on Industry, Science and Technology (the Committee) to conduct the review. The Committee held 52 meetings, heard 263 witnesses, collected 192 briefs, and received more than 6,000 emails and other correspondence.

The Committee consulted a broad range of stakeholders to ensure all perspectives were duly considered. These stakeholders included, among others, creators, educational institutions, industry representatives, teachers, students, interest groups, broadcasters, online service providers, Internet service providers, collective societies, lawyers, and academics. The Committee also dedicated a portion of the review to Indigenous groups and individuals, which could become standard practice when formulating copyright policy. The Committee gathered evidence in a systematic manner that allowed witnesses to bring forth the issues that mattered to them. This report cites every single person who provided oral testimony or submitted a brief to the Committee, and thus recognizes that the complexity of copyright policy requires every issue to be carefully weighed.

The fruit of over ten meetings of deliberations, this Committee's report covers a broad range of topics. They include the protection of traditional and cultural expressions, term extension, computer-generated works, artist's resale rights, fair dealing, safe harbour provisions, perceptual disability provisions, online piracy, proceedings before the Copyright Board of Canada, and the statutory review process itself. After reporting on a few legal developments of the last seven years, the report addresses these topics in turn under six sections: Statutory Review, Indigenous Matters, Rights, Exceptions, Enforcement, and the Collective Administration of Rights.

The report makes 36 recommendations. They include recommendations aiming at reducing the opaqueness of Canadian copyright law, notably by gathering authoritative information on its impact on Canadian creators and creative industries, increasing the transparency of the collective administration of rights, and simplifying the Act. The Committee recommends improving the bargaining power of Canadian creators by granting them a termination right while mitigating the impact of such a right on the commercial exploitation of copyright. It also proposes to sensibly update enforcement mechanisms, starting with statutory damages for rights-holders and collective societies. The recommendations address site-blocking proposals and their potential impact on the form and function of Internet, and assert that online service providers such as Google and Facebook must fully comply with the Act to the benefit of both rights-holders and

users. The report also proposes to move forward to protect traditional and cultural expressions, vitally informed by the testimony of Indigenous witnesses.

Readers will find in the report many "Committee observations." While these observations do not amount to recommendations, they constitute a genuine effort to respond and engage with stakeholders who have taken the time and expended resources to partake in the review, rather than leaving them to speculate on the Committee's motives. The Committee hopes these observations will help stakeholders learn from and reflect on this exercise. This report will not end the debate around copyright law, but it will hopefully help moving it forward.



## LIST OF RECOMMENDATIONS

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*As a result of their deliberations committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.*

### Recommendation 1

**That the Government of Canada introduce legislation to repeal section 92 of the *Copyright Act* in order to remove the requirement to conduct a five-year review of this Act. .... 24**

### Recommendation 2

**That the Government of Canada simplify the wording and the structure of the *Copyright Act*. .... 25**

### Recommendation 3

**That the Government of Canada establish a Research Chair on Remuneration and Business Models for Creators and Creative Industries in the Digital Economy as well as a Research Chair on the Economics of Copyright..... 25**

### Recommendation 4

**That the Government of Canada mandate Statistics Canada to develop consistent indicators and authoritative data on the economic impacts of copyright legislation in Canada, notably to determine its effects on the remuneration of Canadian creators and the revenues of Canadian creative industries. .... 25**

### Recommendation 5

**That the Government of Canada consult with Indigenous groups, experts, and other stakeholders on the protection of traditional arts and cultural expressions in the context of Reconciliation, and that this consultation address the following matters, among others:**

- **The recognition and effective protection of traditional arts and cultural expressions in Canadian law, within and beyond copyright legislation;**

- The participation of Indigenous groups in the development of national and international intellectual property law;
- The development of institutional, regulatory, and technological means to protect traditional arts and cultural expressions, including but not limited to:
  - Creating an Indigenous Art Registry;
  - Establishing an organization dedicated to protecting and advocating for the interests of Indigenous creators; and
  - Granting Indigenous peoples the authority to manage traditional arts and cultural expressions, notably through the insertion of a non-derogation clause in the *Copyright Act*..... 30

#### Recommendation 6

That, in the event that the term of copyright is extended, the Government of Canada consider amending the *Copyright Act* to ensure that copyright in a work cannot be enforced beyond the current term unless the alleged infringement occurred after the registration of the work. .... 38

#### Recommendation 7

That the Government of Canada introduce legislation amending the *Copyright Act* to provide that a reversion of copyright under section 14(1) of the Act cannot take effect earlier than 10 years following the registration of a notification to exercise the reversion..... 38

#### Recommendation 8

That the Government of Canada introduce legislation amending the *Copyright Act* to provide creators a non-assignable right to terminate any transfer of an exclusive right no earlier than 25 years after the execution of the transfer, and that this termination right extinguish itself five years after it becomes available, take effect only five years after the creator notifies their intent to exercise the right, and that the notice be subject to registration. .... 39

#### Recommendation 9

**That the Government of Canada consult with provincial and territorial governments, Indigenous groups, and other stakeholders to explore the costs and benefits of implementing a national artist's resale right, and report on the matter to the House of Commons Standing Committee on Industry, Science and Technology within three years..... 43**

#### Recommendation 10

**That the Government of Canada consider amending the *Copyright Act* to remove the words "created after June 7, 1988," from section 3(1)(g) of this Act, with no retroactive effect and providing stakeholders with a significant transitional period..... 43**

#### Recommendation 11

**That the Government of Canada improve Crown copyright management policies and practices by adopting open licences in line with the open government and data governance agenda, with respect to any work prepared and published:**

- By or under the direction or control of a Canadian government; and
- In the public interest and for the purpose of public use, education, research, or information.

**That the Government of Canada introduce legislation amending the *Copyright Act* to provide that no Canadian government or person authorized by a Canadian government infringe copyright when committing an act, either:**

- Under statutory authority; or
- For the purpose of national security, public safety, or public health.

**In the context of Crown copyright and acts done under statutory authority or for the purpose of national security, public safety, or public health, that the Government of Canada consider implementing measures to compensate rights-holders for acts done by a Canadian government or a person authorized by a Canadian government that would otherwise infringe copyright, when appropriate.**

**That the Crown exercise copyright protections that are reasonably in the public interest. .... 46**

#### **Recommendation 12**

**That the Government of Canada maintain the definition of “sound recording” under section 2 of the *Copyright Act*. .... 48**

#### **Recommendation 13**

**That the Government of Canada update the rules governing first ownership of cinematographic works in light of the digital age and in consideration of maintaining competitiveness in a global market. .... 50**

#### **Recommendation 14**

**That the Government of Canada consider amending the *Copyright Act* or introducing other legislation to provide clarity around the ownership of a computer-generated work. .... 51**

#### **Recommendation 15**

**That the House of Commons Standing Committee on Canadian Heritage consider conducting a study to investigate the remuneration of journalists, the revenues of news publishers, the licences granted to online service providers and copyright infringement on their platforms, the availability and use of online services, and competition and innovation in online markets, building on their previous work on Canada’s media landscape. .... 53**

#### **Recommendation 16**

**That the Government of Canada consider establishing facilitation between the educational sector and the copyright collectives to build consensus towards the future of educational fair dealing in Canada. .... 65**

#### Recommendation 17

**That the House of Commons Standing Committee on Industry, Science and Technology resume its review of the implementation of educational fair dealing in the Canadian educational sector within three years, based on new and authoritative information as well as new legal developments. .... 65**

#### Recommendation 18

**That the Government of Canada introduce legislation amending section 29 of the *Copyright Act* to make the list of purposes allowable under the fair dealing exception an illustrative list rather than an exhaustive one..... 69**

#### Recommendation 19

**That the Government of Canada examine measures to modernize copyright policy with digital technologies affecting Canadians and Canadian institutions, including the relevance of technological protection measures within copyright law, notably to facilitate the maintenance, repair or adaptation of a lawfully-acquired device for non-infringing purposes. .... 72**

#### Recommendation 20

**That the Government of Canada review section 29.21 of the *Copyright Act* to ensure that the creator of non-commercial user-generated content is not held liable for unintended copyright infringement..... 74**

#### Recommendation 21

**That the Government of Canada monitor the implementation, in other jurisdictions, of extended collective licensing as well as legislation making safe harbour exceptions available to online service providers conditional to measures taken against copyright infringement on their platforms..... 83**

#### Recommendation 22

**That the Government of Canada assert that the content management systems employed by online service providers subject to safe harbour exceptions must reflect the rights of rights-holders and users alike..... 83**

#### Recommendation 23

**That the Government of Canada introduce legislation to amend the *Copyright Act* to facilitate the use of a work or other subject-matter for the purpose of informational analysis. .... 87**

#### Recommendation 24

**That the Government of Canada work with industry and relevant stakeholders to explore ways to support the production of works published in formats specially designed for persons with a perceptual disability, and to measure, on a yearly basis, the availability of works published in such formats. .... 89**

#### Recommendation 25

**That the Government of Canada make regulations to require notices sent under the notice-and-notice regime be in a prescribed machine-readable format..... 92**

#### Recommendation 26

**That the Government of Canada examine ways to keep IPv6 address ownership information up-to-date in a publicly accessible format similar in form and function to American Registry for Internet Numbers' IPv4 "WHOIS" service..... 92**

#### Recommendation 27

**Following the review of the *Telecommunications Act*, that the Government of Canada consider evaluating tools to provide injunctive relief in a court of law for deliberate online copyright infringement and that paramount importance be given to net neutrality in dealing with impacts on the form and function of Internet in the application of copyright law. .... 98**

#### Recommendation 28

**That the Government of Canada introduce legislation amending the *Copyright Act* to increase upper and lower limits of statutory damages provided under sections 38.1(1), 38.1(2) and 38.1(3) of this Act to account for inflation, based on the years when they were originally set. .... 101**

#### Recommendation 29

**That the Government of Canada introduce legislation amending the *Copyright Act* to clarify that users can negotiate with a collective society as a group and to allow users to jointly apply to the Copyright Board of Canada, when the Board deems it appropriate. .... 106**

#### Recommendation 30

**That the Government of Canada report to the House of Commons Standing Committee on Industry, Science and Technology within three years on the effectiveness of the reform of the Copyright Board of Canada, including measures introduced and amended by the *Budget Implementation Act, 2018*, No. 2. .... 107**

#### Recommendation 31

**That the Government of Canada introduce legislation amending section 72(2) of the *Copyright Act* to ensure that the radio royalty exemption only applies to small, independent broadcasters.**

**That the Government of Canada make regulations to define “community systems” under section 72(6) of the *Copyright Act* in order to identify broadcasters to which section 72(3) of this Act applies. .... 109**

#### Recommendation 32

**That the Government of Canada evaluate the forms of statutory damages available under the *Copyright Act* to a collective society or a rights-holder who has authorized a collective society to act on their behalf where applicable royalties are set by the Copyright Board of Canada and the defendant has not paid them. .... 114**

#### Recommendation 33

**That the Government of Canada study the private copying regimes in place in other countries with a view to identifying the digital environment, the distribution of royalties flowing from the private copying levy, and the impact on consumers on which a private copying levy applies, including the impact of the private copying regime on the retail prices of the different types of digital device to which they apply. .... 117**

#### Recommendation 34

**That the Government of Canada evaluate the constitutional feasibility of establishing minimal standards in private agreements relating to a transfer of a right provided by the *Copyright Act*. ..... 119**

#### Recommendation 35

**That the Copyright Board of Canada review whether provisions of the *Copyright Act* empower the Board to increase the transparency of collective rights management to the benefit of rights-holders and users through the tariff-setting process, and report to the House of Commons Standing Committee on Industry, Science and Technology within two years..... 120**

#### Recommendation 36

**Given the important role of collective societies in the copyright framework and in the collective administration of rights, that the Government of Canada consider the benefits and mechanisms for increasing the transparency of collective societies, particularly with regards to their operations and the disclosure of their repertoire. .... 120**





HOUSE OF COMMONS  
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CANADA

# STATUTORY REVIEW OF THE *COPYRIGHT ACT*

## INTRODUCTION

**The Committee  
heard a total of  
263 witnesses and  
received 192 briefs.**

Section 92 of the *Copyright Act* (the Act) provides that the Act must be reviewed every five years by a designated or established parliamentary committee. On 13 December 2017, the House of Commons designated the Standing Committee on Industry, Science and Technology (the Committee) to review the Act. The statutory review consisted of

52 meetings, which took place between 13 February 2018 and 16 May 2019. The Committee heard a total of 263 witnesses and received 192 briefs.

This report presents 36 recommendations, most of which are directed to the Government of Canada (the Government). Pursuant to section 109 of the *Standing Orders of the House of Commons*, upon the tabling of the report in the House of Commons and at the request of the Committee, the Government will have 120 days to respond in writing to the Committee on the recommendations therein.

In this report, the phrase “copyrighted content” refers to works and other subject-matters protected under the Act. The “use” of copyrighted content refers to any use of copyrighted content that would fall under the rights of a rights-holder under the Act, such as, in the case of a work, the rights enumerated under section 3 of the Act.



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## LEGAL DEVELOPMENTS, 2012–2017

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### LEGISLATION

This review of the Act is the first conducted since the adoption of the *Copyright Modernization Act* (CMA) in 2012.<sup>1</sup> This section provides a brief review of the contents of the CMA. It also provides a summary of other amendments to the Act made since 2012, as well as some of the notable case law. While this Committee was tasked with conducting a statutory review, it was conscious of the diverse sources of copyright law, including international agreements, decisions of the Copyright Board of Canada, and case law. As such, it was careful to look beyond the Act where necessary.

The CMA received Royal Assent on 29 June 2012. The CMA marked the first major amendments to the Act since 1997 and was the product of a lengthy policy-making process that spanned multiple sessions of Parliament. The CMA made several significant changes to the Act, including the introduction of section 92, the provision requiring this statutory review. Other additions of note include:

- a) An explicit reference to education as an acceptable purpose for the application of fair dealing at section 29;
- b) The notice-and-notice regime at sections 41.25 and 41.26, which provides a method for rights-holders who suspect that an IP address has been used to infringe their copyright to alert the user associated with that address;
- c) The backup copy exception at section 29.24, which allows users to make a “backup” version of a work they either own or have a licence to use;
- d) An amendment to the “ephemeral copies exception” at section 30.9. Previously, this section permitted the creation of temporary copies of a recording for broadcasting purposes, but only if the right to do so was not otherwise available under a licence from a collective society. Under the new Act, the exception applies regardless of any available licence;
- e) A requirement at section 38.1 that, in assessing the quantum of statutory damages available to a rights-holder upon a finding of infringement, a court

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1 S.C. 2012, c. 20.

## STATUTORY REVIEW OF THE COPYRIGHT ACT

must consider whether the infringement was commercial or non-commercial;

- f) The technological protection measures (TPMs) regime at sections 41 to 41.22, which prohibits the circumvention of TPMs used to restrict access to and use of copyrighted content;
- g) The non-commercial user-generated content exception at section 29.21, which allows users to create new works out of pre-existing works as long as the new works are non-commercial and do not adversely affect rights-holders; and
- h) A “safe harbour,” at section 41.27, that limits the liability of providers of digital “information location tools” for infringements that may have occurred using those tools.

Further amendments were made to the Act in 2016, with the passage of An Act to amend the Copyright Act (access to copyrighted works or other subject-matter for persons with perceptual disabilities).<sup>2</sup> Those amendments implemented a series of obligations Canada had assented to as a signatory to the World Intellectual Property Organization’s Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The changes allowed a person with a “perceptual disability,”<sup>3</sup> or those operating at their request or to their benefit, to engage in activities that would otherwise amount to either copyright infringement or circumvention of a TPM, so long as those activities were aimed at providing access to the work at issue in an alternate format.

## NOTABLE DECISIONS

On 12 July 2012, the Supreme Court of Canada (SCC) released a series of five decisions concerning interpretations of the Act (often referred to as the “Copyright Pentology”). While these decisions interpreted the Act as it existed prior to the 2012 amendments, they are nonetheless relevant to this review in at least two ways. First, in Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada, the SCC endorsed, without fully explaining, the concept of “technological neutrality” as a

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2 S.C. 2016, c. C-42.

3 *Copyright Act*, R.S.C. 1985, c. C-42, s. 2.



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principle for interpreting the Act. Many witnesses who appeared before the Committee advocated for changes to the Act based on this principle.<sup>4</sup>

Second, in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*,<sup>5</sup> the SCC concluded that teachers could rely on the fair dealing exception when reproducing works for their students since these students were engaging in “private study.” The SCC reached this conclusion without relying on an explicit fair dealing exception for “education”—which, as noted above, has since been added to the Act.

Three years after the Pentalogy, in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*,<sup>6</sup> the SCC revisited the concept of “technological neutrality.” At issue was a decision from the Copyright Board (the Board) that found that “broadcast-incidental copies,” or reproductions of a work that are made for technical or legal reasons during the broadcasting process, required separate compensation under the Act. The Canadian Broadcasting Corporation (CBC) argued that this assessment was inconsistent with the principle of technological neutrality. The majority of the SCC ultimately found that technological neutrality can not override the language of the Act, which did require the CBC to pay. However, that majority also stated that the Board should have considered technological neutrality in determining the value of those copies and sent it back for redetermination.

**While these decisions [of the Supreme Court of Canada] interpreted the Act as it existed prior to the 2012 amendments, they are nonetheless relevant to this review in at least two ways.**

Another court case relevant to this review relates to a September 2011 decision by York University to “opt out” of its relationship with Access Copyright, a copyright collective that administers reproduction rights associated with a number of literary and artistic works. As a result, York University would no longer pay Access Copyright according to a tariff established by the Board to make copies of materials for its students. Instead, it would rely on subscriptions to online databases, engagement with Access Copyright on a case-by-case basis, and exceptions, like fair dealing, contained within the Act.

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4 2012 SCC 34.

5 2012 SCC 37.

6 2015 SCC 57.

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On 8 April 2013, Access Copyright sued York, seeking to enforce the tariff. York counterclaimed, arguing that its activities fell within fair dealing and that the tariff was not mandatory. Ultimately, the Federal Court sided with Access Copyright, concluding in *Canadian Copyright Licensing Agency v. York University* that York was bound by the Board's decision and that its fair dealing policies were not in compliance with the Act.<sup>7</sup> The York case, which is currently under appeal, is only one piece of a larger ongoing legal battle between Access Copyright and many stakeholders from the Canadian education sector.

In *Nintendo of America Inc. v. King*,<sup>8</sup> the Federal Court was asked, for the first time, to interpret and apply the new provisions of the Act on TPMs. At issue was the sale of "Game Copiers," items that allowed owners of game consoles to download and play unauthorized copies of Nintendo games. The Federal Court ultimately provided a large and liberal interpretation of the "digital lock" provisions: so long as a component is effective in controlling access to or controlling use of the work, it is a TPM under the Act. Moreover, the Court determined that even the physical configuration of a work could be a TPM—in this case, the shape of a Nintendo game cartridge, which, in corresponding to the shape of a slot on a Nintendo game console, "operate[s] much like a lock and key."<sup>9</sup>

On 14 September 2018, the SCC released its decision in *Rogers Communications Inc. v. Voltage Pictures, LLC*.<sup>10</sup> At issue: whether the notice-and-notice regime obliges Internet service providers (ISPs) to keep the identities of customers who have received a notice of alleged infringement from a rights-holder so that the rights-holder, with a court order, could then obtain them for free. The Court found that ISPs are entitled to compensation for their compliance with such an order. While it may seem like a narrow decision, the practical effect could have been significant. Had the Court found otherwise, Voltage and other rights-holders would have been able to use the notice-and-notice regime to freely acquire the identities of thousands of users, thereby steeply reducing the costs of litigation.

*Keatley Surveying Ltd. v. Teranet Inc.*<sup>11</sup> involved a long-running dispute between professional surveyors and Teranet, which manages the Province of Ontario's electronic land registry system (ELRS). Surveyors prepare survey plans, recognized as works under the Act, which are then registered in the ELRS and made available to the public for a

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7 2017 FC 669 (CanLII).

8 2017 FC 246 (CanLII).

9 Ibid., para. 86.

10 2018 SCC 38.

11 2016 ONSC 1717 (CanLII).



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prescribed fee under Ontario's Registry Act and Land Titles Act. Surveyors launched a class action against Teranet before the Superior Court of Justice, claiming that Teranet infringed their copyright given that no portion of the collected fees were distributed back to the authors of the survey plans. The Superior Court dismissed the action of the surveyors, a decision later confirmed by the Court of Appeal for Ontario.<sup>12</sup> While the survey plans had not been prepared by the Government of Ontario, both courts found that they had been published under its direction or control, which there transferred copyright ownership to the Crown.

The SCC granted leave to appeal the case and took it under consideration after having heard, on 29 March 2019, arguments on the proper interpretation of section 12 of the Act from the parties and a number of interveners, the latter of which included the attorney generals of Canada, Ontario, Saskatchewan and British Columbia.

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12 2017 ONCA 748 (CanLII).

STATUTORY REVIEW OF THE COPYRIGHT ACT

## STATUTORY REVIEW

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### APPROACH, EVIDENCE AND CAMPAIGNS

Given the complexity of the endeavour, the Committee adopted a systematic approach to conducting the statutory review of the Act. The review was divided into three phases:

- a) During the first phase, the Committee heard from witnesses representing stakeholders associated with specific industry sectors, such as publishing, the music industry or the provision of telecommunications services;
- b) During the second phase, the Committee heard from interest groups and other stakeholders involved in multiple sectors of activities, such as online service providers (OSPs)—i.e., entities providing a commercial communication service online, such as a search engine or a social media platform; and
- c) In the third phase, the Committee supplemented its preliminary findings with submissions from legal experts, namely academics, professional associations and practicing lawyers.

**Over the course of the review, in addition to written and oral testimony, the Committee and its members received over 6,000 emails.**

To hear from a wide range of stakeholders, the Committee also held meetings in Halifax, Montreal, Toronto, Winnipeg, and Vancouver from 7 to 11 May 2018 to hear the perspectives of Canadians working in all sectors of activities.

Over the course of the review, in addition to written and oral testimony, the Committee and its members received over 6,000 emails. These emails mainly originated from two online campaigns: *Let's Talk Copyright*, organized by OpenMedia, and *I Value Canadian Stories*, organized by a coalition of associations operating in multiple creative industries. The Committee also received almost one hundred postal cards from the Songwriters Association of Canada (SAC). Every single one of these contributions was reviewed and is part of the record of the statutory review.



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## THE CONTRIBUTION OF THE HOUSE OF COMMONS STANDING COMMITTEE ON CANADIAN HERITAGE

At the beginning of the review, the Committee invited the House of Commons Standing Committee on Canadian Heritage (CHPC) to contribute to the statutory review, requesting that it

conduct a study, in the context of copyright, on remuneration models for artists and creative industries, including rights management and the challenges and opportunities of new access points for creative content such as streaming and emerging platforms.

That [CHPC] call upon the expertise of a broad range of stakeholders impacted by copyright to ensure a holistic understanding of the issues at play.

That [CHPC] provide [the Committee] with a summary of testimony and recommendations related to the items mentioned above for the parliamentary review of the Copyright Act.

CHPC presented in the House of Commons a report entitled *Shifting Paradigms* on 15 May 2019. The Committee thanks its colleagues for their contribution and looks forward to consulting their report.

## CONCURRENT DEVELOPMENTS

A challenging aspect of conducting a wide-ranging review of such a crucial piece of legislation is that the ways in which the Act is interpreted and applied may shift significantly during the review. Indeed, several developments on both the domestic and international levels occurred during this statutory review. The most significant of those are described briefly below.

### FairPlay Canada

On 29 January 2018, a coalition of broadcasters, telecommunications companies, and unions and organizations within the Canadian cultural industry, including a number of stakeholders who testified before the Committee during this review, filed an application with the Canadian Radio-television and Telecommunications Commission (CRTC) requesting the creation of an “Independent Piracy Review Agency.” This agency would identify websites or online services that are “blatantly, overwhelmingly, or structurally engaged in copyright piracy” and then require ISPs to block access to those sites or services.



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The coalition argued that online piracy has a significant financial impact on the Canadian entertainment industry, hindering new investment and growth, and that Canada's copyright regime struggles to adequately respond to this growing problem. In response, those opposed to the idea raised concerns around freedom of expression, net neutrality, market competitiveness, and a lack of jurisdiction on the part of the CRTC to deal with copyright issues.

On 2 October 2018, the CRTC issued its ruling on the application. It denied FairPlay's proposal, concluding that the enforcement of the Act was not within its mandate as defined by the Telecommunications Act. The CRTC noted, however, that this Committee's statutory review was ongoing, concluding that "[t]here are also other avenues to further examine the means of minimizing or addressing the impact of copyright piracy, including the parliamentary review of the *Copyright Act*."<sup>13</sup> The Committee did review the relevant provisions of the Act, as seen under the "Enforcement" section of the present report.

### Canada–United States–Mexico Agreement

On 30 November 2018, Canada, the United States, and Mexico signed an agreement (CUSMA) on free trade. Chapter 20 of that agreement, "Intellectual Property Rights," contained several clauses that would commit Canada to harmonizing aspects of its copyright law with those of Mexico and the United States. In many respects, the terms of the CUSMA appear to affirm pre-existing elements of Canada's copyright regime, including anti-circumvention rules, safe-harbour provisions for ISPs and OSPs, and notice-and-notice. One major change, however, is that Canada would need to extend the general term of copyright protection from 50 to 70 years after the death of the author of the work.

### European Union Copyright Directive

On 15 April 2019, the Council of the European Union approved a Directive of the European Parliament and of the Council on copyright in the digital single market (the Directive), which seeks to harmonize digital copyright policy across the European Union (EU). The proposal attracted significant attention from across the cultural industries.

Two elements of the Directive have been particularly controversial and were frequently raised by witnesses in this review. Article 15 of the Directive would provide press publishers with a right to remuneration by "information society service providers" for

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13 Canadian Radio-television and Telecommunications Decision [CRTC], Telecom Decision CRTC 2018-384, Ottawa, 2 October 2018, para. 73.



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the digital use of their publications. Critics suggested that it would amount to a “link tax” that content aggregators, search engines, and other online platforms would have to pay to provide hyperlinks to press publications. However, Article 15 stresses that the right “shall not apply to acts of hyperlinking.”

Article 17 of the Directive would make “online content sharing service providers” liable for the communication to the public, through their platforms, of works or other subject-matter without the authorization of their rights-holders, unless they can show that they have:

- (a) made best efforts to obtain an authorization and
- (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information, and in any event
- (c) acted expeditiously, upon receiving a sufficiently substantiated notice by the rightsholders, to disable access to, or to remove from, their websites the notified works and other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

Article 17(8) also specifies that the “application of this Article shall not lead to any general monitoring obligation.” Article 17(7) of the Directive would also allow the unauthorized upload of parts of works and other subject-matter for the purposes of quotation, criticism, review, caricature, parody, and “pastiche”—i.e., a work imitating the style of another work.

Critics of the provision argue that it would saddle OSPs with massive liability and encourage them to err on the side of caution and take down uploaded content—whether or not it actually infringes copyright. Its opponents have also warned that, given that only the biggest OSPs would be able to afford complying with its requirements, Article 17 could severely reduce competition in online markets.

## Bill C-86

On 29 October 2018, Bill C-86, A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures (Bill C-86) was introduced in the House of Commons. Along with a package of amendments to other aspects of Canada’s intellectual property regime, two sub-divisions of Bill C-86 contained substantial amendments to the Act. It received Royal Assent on 13 December 2018.

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In particular, Bill C-86 amended provisions of the Act governing proceedings before the Board. These amendments, which came into force on 1 April 2019, were preceded by a significant consultation process launched by the Government in 2017<sup>14</sup> as well as a 2016 study by the Senate Standing Committee on Banking, Trade, and Commerce.<sup>15</sup> Changes included:

- Establishing a mandate for the Board and a list of criteria it must consider when setting a tariff (including fairness, competition, transparency, and the public interest);
- Providing shorter timelines for the process of proposing and approving tariffs;
- Reducing the number of “non-voluntary” matters (matters that must be addressed by the Board);
- Preventing the tariff-setting process from having retroactive effects; and
- Streamlining procedure and providing for a case management power for the Chair of the Board.

Sections 243 to 246 of Bill C-86 also made amendments that address concerns that some rights-holders were abusing the notice-and-notice regime by including settlement demands in the notices—unduly pressuring recipients to settle an alleged dispute even when they might not have done anything wrong. These amendments prohibit notices from containing offers to settle or demands for personal information and provide the Governor in Council with the ability to make further prescriptions on the content and the form of a notice.

## FUTURE REVIEWS AND LEGISLATIVE COMPLEXITY

The Committee received submissions not only on the Act, but also on the review process itself. Noting that some of the 2012 amendments are still under litigation, Jeremy de Beer, Professor of Law at the University of Ottawa, argued that five-year intervals do not leave enough time to implement new provisions and interpret them in light of existing

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14 Department of Innovation, Science and Economic Development [ISED], Department of Canadian Heritage [DCH] & Copyright Board of Canada [Copyright Board], *A Consultation on Options for Reform to the Copyright Board of Canada*, 2017.

15 Senate, Standing Committee on Banking, Trade and Commerce, *Copyright Board: A Rationale for Urgent Review*, Seventh Report, 1<sup>st</sup> session, 42<sup>nd</sup> Parliament, November 2016.



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principles. Mr. de Beer added that frequent parliamentary reviews are resource-intensive and time-consuming, encourage short-sighted legislation, and hinder progress by postponing the resolution of difficult issues to the next review.<sup>16</sup> Howard P. Knopf, Counsel at Macerac & Jarzyna, argued that short-interval, periodic reviews increase the risk that Parliament could react prematurely to technological change and before the market develops solutions of its own.<sup>17</sup>

While he believed the current review to be timely, Casey Chisick, Partner at Cassels Brock & Blackwell, maintained that deciding when to review the Act should remain Parliament's prerogative rather than being dictated by statute.<sup>18</sup> Given the lack of publicly available data on the effects of copyright reform, the Intellectual Property Institute of Canada (IPIC) suggested that the Government refrain from making significant amendments to the Act and instead lay down the groundwork for its next mandated review, scheduled in 2022.<sup>19</sup> According to Michael Geist, Professor of Law at the University of Ottawa, the 2016 and 2018 amendments show that Parliament can change the Act whenever appropriate, outside of the review process.<sup>20</sup>

**[F]ive-year intervals do not leave enough time to implement new provisions and interpret them in light of existing principles.**

Other witnesses argued that Parliament should retain the five-year review process to keep up with technological change, address outstanding issues, and ensure the Act works properly.<sup>21</sup> Barry Sookman, Partner at McCarthy Tétrault, suggested to keep reviewing the Act on a regular basis, but to increase the interval of the reviews in order

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- 16 House of Commons, Standing Committee on Industry, Science and Technology [INDU], *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 28 November 2018, 1600, 1700 (Jeremy de Beer, as an individual). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 December 2018, 1700 (Michael Geist, as an individual); Canadian Association of Research Libraries [CARL], *Brief Submitted to INDU*, 28 September 2018.
- 17 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 28 November 2018, 1625, 1705 (Howard P. Knopf, as an individual); Howard P. Knopf, *Brief Submitted to INDU*, 7 January 2019.
- 18 INDU (2018), *Evidence*, 1600 (de Beer); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 December 2018, 1705 (Casey Chisick, as an individual).
- 19 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 December 2018, 1555 (Bob Tarantino & Catherine Lovrics, Intellectual Property Institute of Canada [IPIC]).
- 20 INDU (2018), *Evidence*, 1725 (Geist).
- 21 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 3 December 2018, 1605 (Sarah Mackenzie & Steven Seiferling, Canadian Bar Association [CBA]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 December 2018, 1700 (Ysolde Gendreau, as an individual); INDU (2018), *Evidence*, 1705 (Tarantino & Lovrics, IPIC).

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to allow more time to implement amendments and thoroughly observe their effects.<sup>22</sup> The Screen Composers Guild of Canada (SCGC) suggested reviewing the Act at much shorter intervals than every five years to ensure quick legislative responses to technological changes.<sup>23</sup>

Some witnesses highlighted the complexity of the Act itself as a problem. Copyright legislation was described as “incredibly complex,” at least for non-experts.<sup>24</sup> Arguing that people will tend not to comply with confusing and complicated rules, Georges Azzaria, Full Professor at Université Laval, noted that poorly defined and somewhat redundant phrases increase the complexity of the Act, such as “non-commercial purpose,” “private use,” and “private study.”<sup>25</sup> More generally, Ariel Katz, Associate Professor at the University of Toronto, warned that ever-expanding rights lead to an ever-increasing list of exceptions, and that Parliament could scale down the Act by narrowing the scope of copyright.<sup>26</sup>

Citing Australian copyright legislation as an example to follow, the Board encouraged the Committee to recommend a complete overhaul of the Act to reduce its complexity, notably to make it more understandable to lay creators:

Successive reforms and modifications have resulted in a legislative text that is not only hard to understand but that at times appears to bear some incoherencies. In a world where creators increasingly have to manage their rights themselves, it is important that our legislative tools be written in a manner that facilitates comprehension.<sup>27</sup>

The Maple Family History Group suggested that users too would benefit from enhanced clarity:

Copyright should be simpler, easier to understand and to following both creating original works and in the use of these works in subsequent works either as references or as starting points for original works by other creators. We do want to respect the creators both as to crediting their work and allowing them the financial gain due to

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- 22 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 3 December 2018, 1605 (Barry Sookman, as an individual).
  - 23 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 22 October 2018, 1635 (Paul Novotny & Ari Posner, Screen Composers Guild of Canada [SCGC]).
  - 24 INDU (2018), *Evidence*, 1625 (Tarantino & Lovrics, IPIC).
  - 25 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 3 December 2018, 1535 (Georges Azzaria, as an individual).
  - 26 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 3 December 2018, 1630 (Ariel Katz, as an individual). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 28 November 2018, 1615 (Mark Hayes, as an individual); INDU (2018), *Evidence*, 1640-1645, 1705 (de Beer).
  - 27 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 December 2018, 1625 (Gilles McDougall, Nathalie Théberge & Sylvain Audet, Copyright Board). See also INDU (2018), *Evidence*, 1720 (Chisick).



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them. However, the rules must not be clouded by ambiguity and confusion as to allow diversity and development of new creations.<sup>28</sup>

IPIC warned that while guiding principles can improve public understanding of the Act, they cannot overcome the ongoing tension between competing interests, the resolution of which forms the heart of copyright law.<sup>29</sup>

## Committee Observations and Recommendations

Reviewing the Act in a timely manner is a worthwhile exercise. However, there is not sufficient evidence that technology, industry practices, socio-economic circumstances, and case law change at a rate that justifies reviewing the Act every five years as opposed to any other (shorter or longer) interval. In this case, a five-year interval certainly did not provide enough time to fully assess the effects of the amendments made by the CMA.

Periodic reviews can undermine the stability of the copyright system if key provisions, amendments and precedents are called into question every few years. Frequent reviews also increase the politicization and polarization of copyright law. If stakeholders can rely on the opportunity to appeal to a parliamentary committee at the next review, they may divert time and resources towards lobbying rather than towards developing solutions of their own.

Parliamentary committees should only review the Act, in whole or in part, when the need and opportunity arise. In the meantime, the relevant government departments can monitor the implementation of copyright legislation, identify necessary adjustments, and propose appropriate amendments. The Committee therefore recommends:

### Recommendation 1

**That the Government of Canada introduce legislation to repeal section 92 of the *Copyright Act* in order to remove the requirement to conduct a five-year review of this Act.**

The Committee cannot ignore the fact that legal professionals, academics, and even the Board testified that the Act is too complex and in need of a comprehensive overhaul. If the stakeholders understand the Act, they can more easily comply with or benefit from its provisions. Parliament could improve the Act by simplifying its wording and its

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28 Maple Ridge Family History Group [MRFHG], *Brief Submitted to INDU*, 7 January 2019.

29 INDU (2018), *Evidence*, 1625 (Tarantino & Lovrics, IPIC).

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structure. While such an endeavour would require much effort, it would benefit all stakeholders in the long term. The Committee therefore recommends:

### **Recommendation 2**

**That the Government of Canada simplify the wording and the structure of the Copyright Act.**

Despite the volume and diversity of evidence submitted throughout the review, the Committee observed a problematic lack of authoritative and impartial data and analysis on major issues. Multiple witnesses either overestimated how strongly the data they presented supported their arguments or failed to disclose its limitations. It is worth noting that in recent proceedings before the Senate Committee on Banking, Trade and Commerce, the Board stated that Canadian policymakers and the Board itself lack authoritative economic data and analysis on copyright.<sup>30</sup> The Committee finds that all stakeholders would benefit from increased insight in the copyright system in an easily understandable format, when possible. The Committee therefore recommends:

### **Recommendation 3**

**That the Government of Canada establish a Research Chair on Remuneration and Business Models for Creators and Creative Industries in the Digital Economy as well as a Research Chair on the Economics of Copyright.**

### **Recommendation 4**

**That the Government of Canada mandate Statistics Canada to develop consistent indicators and authoritative data on the economic impacts of copyright legislation in Canada, notably to determine its effects on the remuneration of Canadian creators and the revenues of Canadian creative industries.**

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<sup>30</sup> Senate, Standing Committee on Banking, Trade and Commerce, *Minutes of Proceedings*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 21 November 2018 (Robert A. Blair, Nathalie Théberge, Gilles McDougall & Sylvain Audet, Copyright Board).



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## INDIGENOUS MATTERS

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During the statutory review, the Committee devoted sessions to drawing attention to ways in which Canadian copyright law may fail to protect traditional arts and cultural expressions:

Traditional arts may embody both traditional knowledge, the method of making; and traditional cultural expressions, their external appearance. Many forms of ceremonies, powwow, designs and totems of this heritage reside in the traditional custodians of the stories or images. They include oral traditions, literature, designs, sports and games, visual and performing arts, dances and songs. These manifestations carry not only the sacred knowledge but also the law of Aboriginal peoples.<sup>31</sup>

As described by Indigenous witnesses, copyright law raises difficulties for Indigenous communities in at least two ways. First, many foundational principles of copyright law do not align with the ways in which Indigenous peoples conceive of traditional arts and cultural expressions. Second, Indigenous artists appear especially vulnerable to economic exploitation. As a result, the Committee heard that the Act fails to effectively protect traditional arts and cultural expressions, and may even facilitate their misappropriation.

Contrary to classic conceptions of copyright ownership, which grants individual ownership based on the idea that works originate from one or a few individual authors, for Indigenous witnesses, traditional arts and cultural expressions have communal ownership. As Monique Manatch, Executive Director of the Indigenous Culture and Media Innovations, explained it:

In indigenous communities it is usually a group or society, rather than an individual, who holds the knowledge or expressions. These groups monitor or control the use of these expressions to pass on important knowledge, cultural values and belief systems to later generations. The groups have authority to determine whether the knowledge, expressions, stories and images may be used, who may create them and the terms of reproduction. Before the copyright law was developed in the Canadian common law and statutory law, the various confederations, nations, tribes, clans and societies created, preserved and nourished this knowledge and these expressions.<sup>32</sup>

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31 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 31 October 2018, 1600 (Monique Manatch, Indigenous Culture and Media Innovations [ICMI]).

32 Ibid., 1600 (Manatch, ICMI). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1615 (Lynn Lavallée, as an individual).



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For Indigenous peoples, the value of art extends beyond the means of generating income: art is not only an economic pillar, but also a social one.<sup>33</sup> Lou-ann Neel, Kwagiulth Artists, explained that within Indigenous communities, knowledge is not protected with codified rules, but rather is based on the integrity of members and their sense of responsibility towards the community.<sup>34</sup> Therefore, an individual cannot choose to share or exploit traditional arts and cultural expressions without taking into account communal norms, even less so when that individual is an outsider to that community.<sup>35</sup>

**As described by  
Indigenous witnesses,  
... many foundational  
principles of copyright  
law do not align with  
the ways in which  
Indigenous peoples  
conceive traditional  
arts and cultural  
expressions.**

The interplay, in copyright law, between fixing a work in semi-permanent form and ownership constitutes another area of concern. Under the Act, an expression will not be recognized and thus protected as a work under the Act unless it is fixed in a more or less permanent form. Many traditional cultural expressions, however, are not fixed in such forms. A non-Indigenous person can, however, fix such cultural expressions in a permanent form and thus claim copyright over the resulting work or subject-matter for themselves.<sup>36</sup>

For example, Andrea Bear Nicholas, Professor Emeritus at St. Thomas University, shared with the Committee her experience working with a group of Maliseet families who faced difficulties when they attempted to publish some of their stories in their native language. These stories had been recorded by a non-Indigenous academic between 1970 and 1983, and those holding the rights to the recordings would not authorize them to be published. Ms. Bear Nicholas said that

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33 Tony Belcourt [Belcourt], *Brief Submitted to INDU*, 14 December 2018.

34 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 31 October 2018, 1640 (Lou-ann Neel, as an individual).

35 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1700-1705 (Georgina Liberty & Sharon Parenteau, Manitoba Metis Federation Inc. [MMF]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1710 (Camille Callison, as an individual).

36 Ibid., 1625 (Callison). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1620 (Andrea Bear Nicholas, as an individual); INDU (2018), *Evidence*, 1615 (Lavallée).



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[f]or anthropologists, linguists, and others ... Canadian copyright law has served as the perfect tool for stealing and exploiting our intellectual and cultural heritage, rather than for protecting it and promoting the survival of indigenous cultures.<sup>37</sup>

Thus, even if the cultural expression originates in fact from Indigenous peoples, the law can deprive them from owning copyright on these expressions.<sup>38</sup> Witnesses urged the Committee to review copyright legislation to address the misappropriation of traditional Indigenous art forms.<sup>39</sup>

Witnesses also argued that Indigenous artists face more difficulties obtaining fair remuneration for their work than non-Indigenous artists. Indigenous art is now recognized nationally and internationally, and its sale is an important source of income for many Indigenous artists and their communities, but the sector is undermined by copyright infringement and fraudulent imitation.<sup>40</sup> Witnesses thus reported that Indigenous art is often forged or commercialized without approval, recognition or compensation.<sup>41</sup> Ms. Neel asserted that Indigenous artists are not taken as seriously as other Canadian artists, and thus are unfairly treated.<sup>42</sup>

Witnesses made different proposals to support Indigenous artists and ensure their fair remuneration. Ms. Neel advocated for the establishment of a “national Indigenous arts advocacy and service organization” supported by provincial organizations. Such an organization would collaborate with Canadian Artists’ Representation (CARFAC) and Copyright Visual Arts to support Indigenous artists, fight copyright infringement and misappropriation, and educate the public.<sup>43</sup> Tony Belcourt, Arts and Cultural Knowledge Keeper, argued in favour of establishing an Indigenous Art Registry supported by blockchain technology to authenticate and track sales of Indigenous art.<sup>44</sup> Mr. Belcourt

37 INDU (2018), *Evidence*, 1620 (Nicholas). See also INDU (2018), *Evidence*, 1625 (Callison).

38 Ibid. (Callison).

39 INDU (2018), *Evidence*, 1550 (Neel). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 April 2018, 1605 (Charlotte Kiddell, Canadian Federation of Students [CFS]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 1635 (Pamela Foster & Paul Jones, Canadian Association of University Teachers [CAUT]).

40 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 31 October 2018, 1535 (Tony Belcourt, as an individual).

41 Ibid., 1535 (Belcourt); INDU (2018), *Evidence*, 1550 (Neel); Belcourt, *Brief Submitted to INDU*, 14 December 2018.

42 INDU (2018), *Evidence*, 1630 (Neel).

43 Ibid., 1550 (Neel); Lou-ann Neel, *Brief Submitted to INDU*, 14 December 2018.

44 INDU (2018), *Evidence*, 1625 (Belcourt). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 31 October 2018, 1540 (Johnny Blackfield, as an individual); Belcourt, *Brief Submitted to INDU*, 14 December 2018.

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added that an organization like the one proposed by Ms. Neel could help create and maintain such a Registry.<sup>45</sup>

Witnesses proposed various changes to the Act to protect Indigenous culture and better recognize their rights.<sup>46</sup> Mr. Belcourt added that the Act should recognize cultural rights as it is already the case in the United Nations *Declaration on the Rights of Indigenous Peoples*.<sup>47</sup> In addition to amending the Act, the University of Manitoba's National Centre for Truth and Reconciliation also proposed the consideration of "*sui generis* concepts and methods to recognize, preserve and share Indigenous Traditional Cultural Expressions such as an Indigenous cultural commons."<sup>48</sup> ICMI argued that a non-derogation clause should be added to the Act "to clarify that aboriginal knowledge and cultural expressions are protected and promoted under subsection 52(1) and section 35 of the *Constitution Act, 1982*, and section 25 of the [*Canadian Charter of Rights and Freedoms*]."<sup>49</sup> Such a clause would prevent the misappropriation of Indigenous knowledges and cultures by acknowledging that Indigenous peoples have ceded none of their ancestral rights over traditional arts and cultural expressions.

More generally, several witnesses recommended that the government launch extensive consultations to explore ways to protect traditional arts and cultural expressions from misappropriation and copyright infringement, and to reconcile Indigenous notions of ownership with the Act.<sup>50</sup>

45 INDU (2018), *Evidence*, 1605 (Belcourt).

46 INDU (2018), *Evidence*, 1615 (Lavallée); INDU (2018), *Evidence*, 1630 (Callison); INDU (2018), *Evidence*, 1625 (Liberty & Parenteau, MMF); Ibid., 1535 (Belcourt); INDU (2018), *Evidence*, 1600 (Manatch, ICMI); Canadian Federation of Library Associations [CFLA], *Brief Submitted to INDU*, 20 December 2018.

47 INDU (2018), *Evidence*, 1535 (Belcourt). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1600 (David Westwood, Dalhousie Faculty Association [DFA]); INDU (2018), *Evidence*, 1630 (Callison).

48 National Centre for Truth and Reconciliation [NCTR], *Brief Submitted to INDU*, 14 December 2018.

49 INDU (2018), *Evidence*, 1600 (Manatch, ICMI). See also INDU (2018), *Evidence*, 1555 (de Beer); Sa'ke'j Henderson, *Brief Submitted to INDU*, 3 August 2018; Athabasca University, *Brief Submitted to INDU*, 14 December 2018.

50 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1605 (Alexis Kinloch & Dominic Lloyd, Winnipeg Arts Council [WAC]); INDU (2018), *Evidence*, 1550 (Neel); INDU (2018), *Evidence*, 1605 (Manatch, ICMI). See also INDU (2018), *Evidence*, 1555 (Kiddell, CFS); INDU (2018), *Evidence*, 1645 (Foster & Jones, CAUT); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 April 2018, 1555 (Denise Amyot & Mark Hanna, Colleges and Institutes Canada [CIC]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 April 2018, 1530 (Glenn Rollans & Kate Edwards, Association of Canadian Publishers [ACP]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 April 2018, 1535 (Katherine McColgan & Victoria Owen, CFLA); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1415 (Teresa Workman, Association of Nova Scotia University Teachers [ANSUT]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1400 (Andrea Stewart & Donna Bourne-Tyson, Council of Atlantic University Libraries [CAUL]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1910 (Lisa Macklem, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018,



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## COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

The Committee recognizes that, in many cases, the Act fails to meet the expectations of Indigenous peoples with respect to the protection, preservation, and dissemination of their cultural expressions. The Committee also recognizes the need to effectively protect traditional arts and cultural expressions in a manner that empowers Indigenous communities, and to ensure that individual Indigenous creators have the same opportunities to fully participate in the Canadian economy as non-Indigenous creators.

Achieving these objectives will require that policymakers approach the matter in creative ways. They could, for example, draw inspiration outside of copyright and intellectual property law and carefully consider how different legal traditions, including Indigenous legal traditions, interact with each other. Such work requires a more focused and extensive consultation process than this statutory review. However, the Committee cannot stress enough the importance of moving forward collaboratively with Indigenous groups and other stakeholders on the matter, and that potential solutions proposed by Indigenous witnesses in this review should serve as a starting point. The Committee therefore recommends:

### Recommendation 5

**That the Government of Canada consult with Indigenous groups, experts, and other stakeholders on the protection of traditional arts and cultural expressions in the context**

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1905 (Daniel Elves, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 31 May 2018, 1555 (Nancy Marrelli, Canadian Council of Archives [CCA]); Meera Nair, *Brief Submitted to INDU*, 31 May 2018; Dalhousie Faculty Association [DFA], *Brief Submitted to INDU*, 13 June 2018; Mount Royal University [MRU], *Brief Submitted to INDU*, 18 June 2018; Writers' Union of Canada [WUC], *Brief Submitted to INDU*, 18 June 2018; CIC, *Brief Submitted to INDU*, 3 August 2018; University of Calgary, *Brief Submitted to INDU*, 5 September 2018; CCA, *Brief Submitted to INDU*, 13 September 2018; MacEwan University, *Brief Submitted to INDU*, 13 September 2018; Quebec Library Association [QLA], *Brief Submitted to INDU*, 13 September 2018; CARL, *Brief Submitted to INDU*, 28 September 2018; Canadian Research Knowledge Network [CRKN], *Brief Submitted to INDU*, 28 September 2018; University of Alberta, *Brief Submitted to INDU*, 20 November 2018; Council of Post-Secondary Library Directors of British Columbia [CPSLDBC], *Brief Submitted to INDU*, 4 December 2018; CAUT, *Brief Submitted to INDU*, 14 December 2018; Emily Carr University of Art and Design [ECUAD], *Brief Submitted to INDU*, 14 December 2018; NCTR, *Brief Submitted to INDU*, 14 December 2018; NorQuest College, *Brief Submitted to INDU*, 14 December 2018; University of Victoria, *Brief Submitted to INDU*, 14 December 2018; CFLA, *Brief Submitted to INDU*, 20 December 2018; Canadian Association of Law Libraries [CALL], *Brief Submitted to INDU*, 7 January 2019; Sara Bannerman, Pascale Chapdelaine, Olivier Charbonneau, Carys Craig, Lucie Guibault, Ariel Katz, Meera Nair, Graham Reynolds, Teresa Scassa, Myra Tawfik & Samuel E. Trosow [Tawfik et al.], *Brief Submitted to INDU*, 18 January 2019. See also House of Commons, Standing Committee on Canadian Heritage, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 27 November 2018, 1235 (Scott Robertson, Indigenous Bar Association).

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**of Reconciliation, and that this consultation address the following matters, among others:**

- **The recognition and effective protection of traditional arts and cultural expressions in Canadian law, within and beyond copyright legislation;**
- **The participation of Indigenous groups in the development of national and international intellectual property law;**
- **The development of institutional, regulatory, and technological means to protect traditional arts and cultural expressions, including but not limited to:**
  - **Creating an Indigenous Art Registry;**
  - **Establishing an organization dedicated to protecting and advocating for the interests of Indigenous creators; and**
  - **Granting Indigenous peoples the authority to manage traditional arts and cultural expressions, notably through the insertion of a non-derogation clause in the *Copyright Act*.**



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## RIGHTS

### TERM EXTENSION, REVERSION RIGHT AND TERMINATION RIGHT

In Canada, a copyright work is generally protected for 50 years after the life of the author but subsists for 70 years in a performer's performance or a sound recording after their first publication.<sup>51</sup> The duration of the general term of copyright in Canada is shorter than in most of its main economic partners (see Figure 1), but some of these countries provide shorter or longer terms to different types of works and other subject-matters. For example, in Japan, the term lasts 50 years after the life of the author, but subsists for 70 years in a cinematographic work.<sup>52</sup> In the United Kingdom (UK), copyright generally expires 70 years after the life of the author, but in the case of a computer-generated work or a broadcast, the term only extends to 50 years, while copyright in typographical arrangements of a published edition extends to 25 years after the edition was first published.<sup>53</sup> German copyright legislation provides more variations: copyright term generally lasts for 70 years after the life of the author, but certain neighbouring rights last between one year (for press products) and 50 years (for photographs, moving pictures, and broadcasts), while such rights in databases last for 15 years.<sup>54</sup>

**[S]ome witnesses urged the Committee to recommend measures that would mitigate the possible adverse impacts of term extension.**

51 *Copyright Act*, s. 6, 23(1).

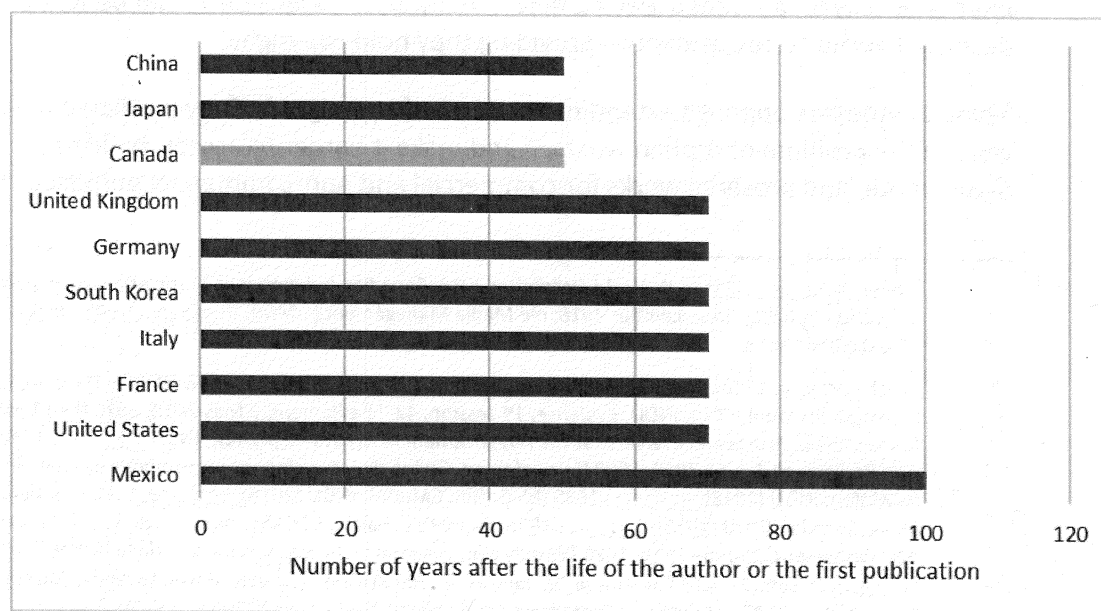
52 Masayuki Yamanouchi & Yuri Fukui, "[Japan: Copyright 2019](#)," *International Comparative Legal Guides*, 2018.

53 Rebecca O'Kelly-Gillard & Phil Sherell, "[United Kingdom: Copyright 2019](#)," *International Comparative Legal Guides*, 2018.

54 Piet Bubenzer & David Jahn, "[Germany: Copyright 2019](#)," *International Comparative Legal Guides*, 2018.

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**Figure 1—Comparison of general copyright terms in various countries**



Source : Figure prepared from Phil Sherrell (ed.), *“Copyright Laws and Regulations 2019,” Copyright Laws and regulations 2019, 2018.*

Several witnesses supported extending the copyright term from 50 to 70 years after the death of the author of a work.<sup>55</sup> While authors would not directly benefit from term extension, its proponents argued that it would increase opportunities to monetize copyrighted content, and thus increase the value of copyright holdings and encourage investments in the creation, acquisition, and commercialization of existing and future copyrighted content.<sup>56</sup> Term extension would also further harmonize our legislation with

55 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 June 2018, 1550 (Ian MacKay, Re:Sound Music Licensing Company [Re:Sound]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 June 2018, 1600 (Solange Drouin, Association Québécoise de l'industrie du disque, du spectacle et de la vidéo [ADISQ]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 June 2018, 1615 (Caroline Rioux, Canadian Musical Reproduction Rights Agency [CMRRA]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 12 December 2018, 1705 (Patti-Anne Tarlton, Ticketmaster Canada [Ticketmaster]); Music Canada, *Brief Submitted to INDU*, 14 December 2018; Société des auteurs de radio, télévision et cinéma [SARTEC], *Brief Submitted to INDU*, 14 December 2018. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 31 May 2018 1610 (Christine Peets, Professional Writers Association of Canada [PWAC]).

56 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 June 2018, 1705 (Margaret McGuffin, Canadian Music Publishers Association [CMuPA]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 12 June 2018, 1550 (Graham Henderson, Music Canada); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 June 2018, 1630, 1640 (Eric Baptiste & Gilles Daigle, Society of Composers, Authors and Music Publishers of Canada [SOCAN]); INDU (2018), *Evidence*, 1640 (Chisick); Société des auteurs et compositeurs dramatiques & Société civile des auteurs multimédia [SACD & SCAM], *Brief Submitted to INDU*, 12 June 2018; SOCAN, *Brief Submitted to INDU*, 13 June 2018; Syndicat national de l'édition [SNE], *Brief Submitted to INDU*, 22 June 2018; George



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that of major trading partners, and so ensure that Canadian rights-holders compete internationally on a levelled playing field. Finally, term extension would benefit a deceased author's descendants—providing they hold copyright.<sup>57</sup>

Several witnesses opposed extending the term of copyright.<sup>58</sup> They predicted it will worsen the problem of orphan works,<sup>59</sup> and make it harder to access, build on, disseminate, and preserve works for commercial and non-commercial purposes.<sup>60</sup> For

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Barker, *Brief Submitted to INDU*, 14 December 2018; Canadian Independent Music Association [CIMA], *Brief Submitted to INDU*, 14 December 2018; ole Media Management [OMM], *Brief Submitted to INDU*, 14 December 2018.

- 57 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1405 (Marian Hebb & William Harnum, Canadian Copyright Institute [CCI]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1620 (Ken Thompson & Marian Hebb, Artists and Lawyers for the Advancement of Creativity [ALAC]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 June 2018, 1600 (Éric Lefebvre, Guilde des musiciens et musiciennes de Québec [GMMQ]); INDU (2018), *Evidence*, 1635 (McGuffin, CMuPA); INDU (2018), *Evidence*, 1550 (Henderson, Music Canada); INDU (2018), *Evidence*, 1630 (Baptiste & Daigle, SOCAN); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 June 2018, 1620 (Wendy Noss, Motion Picture Association-Canada [MPAC]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 June 2018, 1630 (Alain Lauzon & Martin Lavallée, Society for Reproduction Rights of Authors, Composers and Publishers in Canada [SODRAC]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 September 2018, 1555, 1620 (Mathieu Plante & Stéphanie Hénault, SARTEC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 15 October 2018, 1555 (Elisabeth Schlittler & Patrick Lowe, SACD); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 November 2018, 1605 (Jeff Price, as an individual); SOCAN, *Brief Submitted to INDU*, 13 June 2018; Canadian Association of Professional Image Creators & Professional Photographers of Canada [CAPIC & PPC], *Brief Submitted to INDU*, 4 July 2018; CCI, *Brief Submitted to INDU*, 21 September 2018; ALAC, *Brief Submitted to INDU*, 14 December 2018; Canadian Authors Association [CAA], *Brief Submitted to INDU*, 14 December 2018; OMM, *Brief Submitted to INDU*, 14 December 2018.
- 58 INDU (2018), *Evidence*, 1650 (Foster & Jones, CAUT); INDU (2018), *Evidence*, 1400 (Stewart & Bourne-Tyson, CAUL); INDU (2018), *Evidence*, 1600 (Westwood, DFA); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 29 May 2019, 1605 (Jean-Philippe Béland, Wikimedia Canada); University of Lethbridge, *Brief Submitted to INDU*, 28 September 2018.
- 59 Consumer Technology Association [CTA], *Brief Submitted to INDU*, 11 September 2018; University of New Brunswick [UNB], *Brief Submitted to INDU*, 4 December 2018.
- 60 INDU (2018), *Evidence*, 1910 (Macklem); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 1410 (Christine Middlemass & Donald Taylor, British Columbia Library Association [BCLA]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 29 October 2018, 1640, 1720 (Michael Petricone, CTA); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 29 October 2018, 1640 (Kelsey Merkley, Creative Commons Canada [CrCC]); INDU (2018), *Evidence*, 1600 (de Beer); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1910 (Christina de Castell, as an individual); Creative Commons, *Brief Submitted to INDU*, 25 May 2018; DFA, *Brief Submitted to INDU*, 13 June 2018; MRU, *Brief Submitted to INDU*, 18 June 2018; International Federation of Library Associations and Institutions [IFLA], *Brief Submitted to INDU*, 12 October 2018; University of Alberta, *Brief Submitted to INDU*, 20 November 2018; CPSLDBC, *Brief Submitted to INDU*, 4 December 2018; Mark Akrigg, *Brief Submitted to INDU*, 14 December 2018; Carley Angelstad, Sara Barnard, Joel Blechinder, Allison Easton, Erin Hoar, Christine Hutchinson, Christian Isbiter, Jack Lawrence, Jennifer McDevitt, Deniz Ozgan, Holly Pickering, Emily Villanueva & Katherine Welss, *Brief Submitted to INDU*, 14 December 2018; Athabasca University, *Brief Submitted to INDU*, 14 December 2018; Bibliothèque et Archives nationales du Québec [BAnQ], *Brief Submitted to INDU*, 14 December 2018; Campus Stores Canada [CSC], *Brief Submitted to INDU*,



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example, Don LePan, CEO and founder of Broadview Press, argued that term extension reduces competition by delaying the publication of value-added editions of century-old works.<sup>61</sup> Others also argued that a period equal to the life of the author plus 50 years offers more than enough time for rights-holders to profit from copyrighted content and that extending it would not increase incentives to create.<sup>62</sup> While the Society of Composers, Authors and Music Publishers of Canada claimed that no evidence suggests that extending the term of copyright would have a noticeable impact on users and music consumption.<sup>63</sup> Author-composer-performer Bryan Adams commented that extending the term of copyright would “essentially [enrich] large firms of intermediaries, without providing money to creators.”<sup>64</sup>

**[A] termination right would address the bargaining imbalance between creators and other members of creative industries.**

If the current version of the CUSMA is ratified, Parliament would need to make the Act compliant with the new agreement by extending copyright from 50 to 70 years after the death of the author of a work. While this development would likely please many stakeholders, some witnesses urged the Committee to recommend measures that would mitigate the possible adverse impacts of term extension.<sup>65</sup> These measures could include expanding fair dealing, for example by adopting an illustrative rather than exhaustive approach, as discussed later in this report.<sup>66</sup> Other witnesses suggested subjecting copyright protection for an extra 20 years to formalities, such as registration

14 December 2018; ECUAD, *Brief Submitted to INDU*, 14 December 2018; MRFHG, *Brief Submitted to INDU*, 7 January 2019.

61 Don LePan, *Brief Submitted to INDU*, 5 September 2018. See also Broadview Press, *Brief Submitted to INDU*, 16 April 2018.

62 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1905 (Jean Dryden, as an individual); INDU (2018), *Evidence*, 1405 (Allan Bell & Susan Parker, University of British Columbia [UBC]); MacEwan University, *Brief Submitted to INDU*, 13 September 2018; UBC, *Brief Submitted to INDU*, 21 September 2018; CARL, *Brief Submitted to INDU*, 28 September 2018; Athabasca University, *Brief Submitted to INDU*, 14 December 2018.

63 INDU (2018), *Evidence*, 1535 (Baptiste & Daigle, SOCAN).

64 Bryan Adams & Mario Bouchard [Adams & Bouchard], *Brief Submitted to INDU*, 14 December 2018. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 29 October 2018, 1730 (Laura Tribe & Marie Aspiazu, OpenMedia); CAUT, *Brief Submitted to INDU*, 3 August 2018.

65 INDU (2018), *Evidence*, 1645 (Tribe & Aspiazu, OpenMedia); Michael Geist, *Brief Submitted to INDU*, 14 December 2018.

66 INDU (2018), *Evidence*, 1635, 1640 (Petricone, CTA); INDU (2018), *Evidence*, 1640 (Merkley, CrCC); INDU (2018), *Evidence*, 1600 (de Beer).



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and the payment of a fee. Such a mitigation measure would comply with international obligations, promote copyright registration, and help lessen the orphan work problem.<sup>67</sup>

As negotiated by the parties to the new trade agreement, Canada would benefit from a two-and-a-half-year transition period after the ratification of the CUSMA. This transition period would provide the Government enough time to implement the changes, including term extension, in consultation with stakeholders. Due to the difficulty of conducting such an analysis, however, the Department of Innovation, Science and Economic Development did not assess the specific economic implications of the transition period or its duration.<sup>68</sup>

Mr. Adams proposed providing authors with a right to terminate all copyright assignment 25 years after the date of the assignment, which would be exercised with limited formality.<sup>69</sup> According to Mr. Adams, a termination right would address the bargaining imbalance between creators and other members of creative industries who often have the upper hand in negotiations over the transfer of copyright, which may lead creators to undersell their copyright. A termination right would grant creators the opportunity to resell their copyright with better knowledge of its market value, 25 years after its assignment. Mr. Adams added that introducing a termination right would “ensure that more of the benefits from copyright extension flow to creators.”<sup>70</sup>

Jérôme Payette, Executive Director of the Professional Music Publishers Association (PMPA), did not believe termination rights to be necessary, arguing that the Act can already accommodate such an arrangement in the assignment contract. Mr. Payette would instead prefer amendments that would increase the revenues of all rights-

67 INDU (2018), *Evidence*, 1640 (Petricone, CTA); INDU (2018), *Evidence*, 1650 (Knopf); INDU (2018), *Evidence*, 1600, 1655 (de Beer); INDU (2018), *Evidence*, 1640 (Geist); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 12 December 2018, 1700 (Carys Craig, as an individual); Library Association of Alberta [LAA], *Brief Submitted to INDU*, 14 December 2018. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1910 (Andrew Oates).

68 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 1630, 1700 (Mark Schaan & Martin Simard, ISED).

69 Adams & Bouchard, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1600-1605, 1610 (Peets, PWAC); INDU (2018), *Evidence*, 1640 (Merkley, CrCC); INDU (2018), *Evidence*, 1720 (Knopf); INDU (2018), *Evidence*, 1710 (Craig); Authors Alliance, *Brief Submitted to INDU*, 14 December 2018; Cultural Capital Project [CCP], *Brief Submitted to INDU*, 7 January 2019; MRFHG, *Brief Submitted to INDU*, 7 January 2019.

70 Adams & Bouchard, *Brief Submitted to INDU*, 14 December 2018. But see INDU (2018), *Evidence*, 1645 (Chisick).

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holders, who can then determine amongst themselves how to best share these revenues.<sup>71</sup>

In the same vein, the Committee received testimony on section 14 of the Act, which provides a reversion mechanism to the benefit of the descendants of an author. As described by Bob Tarantino, Counsel at Dentons Canada, this provision “deems void any assignments, grants or exclusive licences that a deceased author entered into during their lifetime and re-vests copyright in the author’s heirs twenty-five years after the death of the author.”<sup>72</sup> Section 14 of the Act provides the descendants of the author with the opportunity to renegotiate the assignment of copyright or the grant of an interest in copyright, which may have increased in value since the time of its transfer. Mr. Tarantino proposed eliminating this reversion mechanism because it significantly increases the uncertainty of copyright transfers with little benefit to creators and their descendants, and may instead hinder the commercial exploitation of the copyrighted content.<sup>73</sup>

Arguments made by Mr. Tarantino in favour of repealing section 14 of the Act could very well apply against Mr. Adams’ proposal of a termination right:

[G]iven the uncertainty of their ownership and the fact that they will not be legally entitled to exploit rights in the work during the last twenty-five years of the copyright term, informed assignees and licensees will be inclined to discount the value they are prepared to pay up-front to an author for a work.... Similarly, owners will be disinclined to invest resources towards the exploitation of a work which is nearing the reversionary threshold, because they will be uncertain whether an author’s heirs will assert a reversionary claim.<sup>74</sup>

In contrast, Mr. Geist argued that American copyright legislation provides a termination right to the benefit of creators, and that “there’s quite a lot of investment taking place in this sector, without concern about the way their system has worked, which has given rights back to the author.”<sup>75</sup> The fact that so many witnesses who represent the interests of rights-holders urged the Committee to extend the term of copyright, but said virtually nothing against the reversion mechanism, suggests its actual impact on business

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71 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 September 2018, 1605, 1645 (Jérôme Payette, Professional Music Publishers Association [PMPA]). See also INDU (2018), *Evidence*, 1645 (Chisick). But see INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 December 2018, 1725 (Warren Sheffer, as an individual).

72 Bob Tarantino, *Brief Submitted to INDU*, 13 June 2018.

73 Ibid. See also INDU (2018), *Evidence*, 1555-1600 (Marrelli, CCA); INDU (2018), *Evidence*, 1530, 1615, 1655 (Chisick); CCA, *Brief Submitted to INDU*, 13 September 2018.

74 Bob Tarantino, *Brief Submitted to INDU*, 13 June 2018.

75 INDU (2018), *Evidence*, 1645 (Geist).



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practices remains limited.<sup>76</sup> The Artists and Lawyers for the Advancement of Creativity (ALAC) and the Authors Alliance proposed maintaining the reversion mechanism since it provides important benefits to the author's heirs.<sup>77</sup>

## Committee Observations and Recommendations

The Committee shares Mr. de Beer's pragmatic perspective on term extension;<sup>78</sup> it favours extending the term of copyright, but only if CUSMA is ratified. The Committee expects that rights-holders will benefit from term extension, but also notes the arguments made against it. The Committee believes that requiring rights-holders to register their copyright to enjoy its benefits after a period equal to the life of the author plus 50 years would mitigate some of the disadvantages of term extension, promote copyright registration, and thus increase the overall transparency of the copyright system. The Committee therefore recommends:

### Recommendation 6

**That, in the event that the term of copyright is extended, the Government of Canada consider amending the *Copyright Act* to ensure that copyright in a work cannot be enforced beyond the current term unless the alleged infringement occurred after the registration of the work.**

Given that many witnesses supported term extension to increase the revenues of the descendants of the author, it would be counterproductive to repeal section 14 of the Act. The provision could be amended, however, to increase the predictability of the reversion mechanism. The Committee therefore recommends:

### Recommendation 7

**That the Government of Canada introduce legislation amending the *Copyright Act* to provide that a reversion of copyright under section 14(1) of the Act cannot take effect earlier than 10 years following the registration of a notification to exercise the reversion.**

Arguments against the termination right failed to persuade the Committee. Creators already receive little remuneration for their work, the effective lifespan of most

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<sup>76</sup> But see INDU (2018), *Evidence*, 1615 (Tarantino & Lovracs, IPIC).

<sup>77</sup> ALAC, *Brief Submitted to INDU*, 14 December 2018; Authors Alliance, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1710 (Hayes); Mark Hayes, *Brief Submitted to INDU*, 20 November 2018.

<sup>78</sup> INDU (2018), *Evidence*, 1600 (de Beer).

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copyrighted content tends to be short, and the American experience does not suggest that the termination right deter investment. The argument that individual creators do not need a statutory termination right because they can obtain its equivalent via contractual negotiations begs the question of what little bargaining the authors and performers have to begin with—an imbalance the termination right is meant to address in the first place. The notion that providing a termination right to creators would somewhat hinder the economic exploitation of copyrighted content suggests that creators lack entrepreneurship, but like Graham Henderson, President and CEO of Music Canada, said, “every musician is a businessman, now more than ever.”<sup>79</sup>

If copyrighted content is still commercially profitable 25 years after being created, its creator should have opportunity to increase the revenues they draw from it. The Government, should, however, take measures to make the exercise of the termination right predictable. The Committee therefore recommends:

### Recommendation 8

**That the Government of Canada introduce legislation amending the *Copyright Act* to provide creators a non-assignable right to terminate any transfer of an exclusive right no earlier than 25 years after the execution of the transfer, and that this termination right extinguish itself five years after it becomes available, take effect only five years after the creator notifies their intent to exercise the right, and that the notice be subject to registration.**

## ARTIST'S RESALE RIGHT

The Committee received proposals to introduce an artist's resale right (ARR) in the Act at a rate of 5% on sales of at least \$1,000.<sup>80</sup> An ARR would entitle visual artists to receive a

79 INDU (2018), *Evidence*, 1605 (Henderson, Music Canada).

80 INDU (2018), *Evidence*, 1605 (Kinloch & Lloyd, WAC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 15 October 2018, 1535 (David Yazbeck, Copyright Visual Arts [CVA]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2018, 1550 (Bernard Guérin & Banza, Regroupement des artistes en arts visuels du Québec [RAAVQ]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2018, 1535 (April Britski & Vettivelu, Canadian Artists' Representation [CARFAC]); INDU (2018), *Evidence*, 1535 (Belcourt); INDU (2018), *Evidence*, 1535 (Azzaria); CVA, *Brief Submitted to INDU*, 15 October 2018; SOCAN, *Brief Submitted to INDU*, 13 June 2018; CARFAC, *Brief Submitted to INDU*, 26 October 2018; RAAVQ, *Brief Submitted to INDU*, 26 October 2018; CBA, *Brief Submitted to INDU*, 4 December 2018; ALAC, *Brief Submitted to INDU*, 14 December 2018; Association acadienne des artistes professionnel(le)s du Nouveau-Brunswick, *Brief Submitted to INDU*, 14 December 2018; Belcourt, *Brief Submitted to INDU*, 14 December 2018; CVA, *Brief Submitted to INDU*, 14 December 2018; International Authors Forum, *Brief Submitted to INDU*, 14 December 2018; International Confederation of Societies of Authors and Composers [ICSAC], *Brief Submitted to INDU*, 14 December 2018; SODRAC, *Brief Submitted to INDU*, 20 December 2018.



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royalty payment each time their work is resold publicly through an auction house or a commercial gallery.<sup>81</sup> Witnesses reminded the Committee that the ARR is recognized in the Berne Convention as a reciprocal right,<sup>82</sup> that it was discussed but not implemented in 2012, and that, in 2017, the House of Commons Standing committee on Finance recommended amending the Act and the *Income Tax Act* to include the ARR.<sup>83</sup>

**Proponents of the ARR argued that it would allow artists to promote their work and benefit from its ongoing profits.**

While the proposed ARR reflects the Australian legislation,<sup>84</sup> implementing rules—including the royalty rate and application thresholds—vary from one jurisdiction to another.<sup>85</sup> For example, EU members must provide an ARR at a starting royalty rate of 4% or 5% that progressively decreases to 0.25% as the sale price increases, with a royalty cap set at €12,500. Moreover, each EU member sets the minimum sale price from which the ARR applies, never exceeding €3,000.<sup>86</sup>

Proponents of the ARR argued that it would allow artists to promote their work and benefit from its ongoing profits, which can be substantial as the value of art sometimes

81 INDU (2018), *Evidence*, 1535 (Britski & Vettivelu, CARFAC). See also CARFAC, *Brief Submitted to INDU*, 26 October 2018.

82 ICSAC, *Brief Submitted to INDU*, 14 December 2018.

83 CARFAC, *Brief Submitted to INDU*, 26 October 2018.

84 *Resale Royalty Right for Visual Artists Act 2009*, No 125, s. 10, 18 (Australia: 5% royalty rate, minimum threshold set at AU\$1,000). See also *Civil Code*, s. 986 (California: 5% royalty rate, minimum threshold set at US\$1,000), but see Amanda Svachula, "California Tried to Give Artists a Cut. But the Judges Said No," *The New York Times*, 11 July 2018.

85 Compare for example *Loi n. 491 du 24/11/1948 sur la protection des oeuvres littéraires et artistiques*, s. 11-1 (Monaco: 3% royalty rate); *Décret no 98-435 du 16 juin 1998 portant Règlement général de perception des droits d'auteur et des droits voisins*, s. 17 (Madagascar: 5% royalty rate); *Decree No 2000-573/PRES/PM/MAC/MCPEA/MJPDH on Fixing the Rate of the Droit de Suite (Resale Royalty Right) on Graphic and Three-dimensional Works*, s.2 (Burkina Faso: 10% royalty rate).

86 *Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art*, 2001 OJ (L 272), a. 3-4. Compare for example *Code de la propriété intellectuelle*, s. L122-8, R122-2-R122-12 (France: minimum threshold set at €750); *The Artist's Resale Right Regulations 2006*, 2006, No 346, s. 12, Schedule 1 (United Kingdom: minimum threshold set at €1,000); *Code de droit économique*, art. XI.175-XI.178 (Belgium: minimum threshold set at €2,000).

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increases over time.<sup>87</sup> As a royalty, the ARR would be administered by a collective agency.<sup>88</sup> Moreover, the International Confederation of Societies of Authors and Composers (ICSAC) argued that no data prove that it would have a negative impact on the market, with evidence showing instead that, in the UK, the implementation of the ARR had no impact on market prices or sales.<sup>89</sup> CARFAC assured the Committee that an ARR would not encourage the displacement of sales in countries that do not provide such a right since the costs of exporting art would likely be greater than the fees associated with the ARR. Importantly, Indigenous peoples may strongly benefit from the ARR as many of them are visual artists.<sup>90</sup> Indeed, the ICSAC reported that in Australia, between 2010 and 2015, 65% of the artists who benefited from the ARR were Indigenous.<sup>91</sup> However, Mr. Belcourt warned that, while an ARR is desirable, the ARR as proposed may not help Indigenous artists because only a few of them sell their art through auction houses or commercial galleries.<sup>92</sup>

Other witnesses opposed the implementation of an ARR.<sup>93</sup> They argued that it is an inappropriate tool to help low-income visual artists, since only a small group of well-known artists have their work sold by professionals and for a significant price. Indeed, Mr. Katz and Guy Rub, Professor of Law at Ohio State University, reported that, in the UK, “the top 100 artists shared 80% of all royalties collected” under the ARR.<sup>94</sup> Despite reassurances of the proponents of the ARR, some witnesses contended that it would have a negative impact on the artwork market as it could lead to a decline in the price

87 INDU (2018), *Evidence*, 1635 (Yazbeck, CVA); INDU (2018), *Evidence*, 1535 (Britski & Vettivelu, CARFAC); SOCAN, *Brief Submitted to INDU*, 13 June 2018; CARFAC, *Brief Submitted to INDU*, 26 October 2018; ICSAC, *Brief Submitted to INDU*, 14 December 2018.

88 INDU (2018), *Evidence*, 1535 (Britski & Vettivelu, CARFAC). See also SOCAN, *Brief Submitted to INDU*, 13 June 2018; CARFAC, *Brief Submitted to INDU*, 26 October 2018.

89 ICSAC, *Brief Submitted to INDU*, 14 December 2018.

90 INDU (2018), *Evidence*, 1540 (Britski & Vettivelu, CARFAC); SOCAN, *Brief Submitted to INDU*, 13 June 2018.

91 ICSAC, *Brief Submitted to INDU*, 14 December 2018.

92 INDU (2018), *Evidence*, 1625 (Belcourt); Belcourt, *Brief Submitted to INDU*, 14 December 2018.

93 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2017, 1530 (Mark London, Art Dealers Association of Canada [ADAC]); INDU (2018), *Evidence*, 1720 (Knopf); INDU (2018), *Evidence*, 1720 (Hayes). See also Canadian Museums Association, *Brief Submitted to INDU*, 5 September 2018; Ariel Katz & Guy Rub, *Brief Submitted to INDU*, 14 December 2018.

94 Katz & Rub, *Brief Submitted to INDU*, 14 December 2018. See also ADAC, *Brief Submitted to INDU*, 17 October 2018.



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and the number of primary sales of artwork,<sup>95</sup> and it would displace resale activities in private sales and in other jurisdictions.<sup>96</sup>

Witnesses also noted possible logistical concerns in implementing the ARR. Some argued that the administration of the ARR would be expensive and time-consuming, and that the only real beneficiary would be the collective society administering it.<sup>97</sup> On the other hand, CARFAC and ICSAC claimed that the burden would be minimal.<sup>98</sup> The ADAC also stated that because artworks enter the market in various ways, determining their ownership would be very complex.<sup>99</sup> Nevertheless, the CARFAC and the Regroupement des artistes en arts visuels du Québec argued that there are tools available to ensure that works of art are effectively tracked and authenticated,<sup>100</sup> such as blockchain technology.<sup>101</sup> Mr. Katz and Mr. Rub argued that, because the ARR is in fact a personal property right associated with a tangible good, rather than an intangible asset, the ARR does not belong to copyright and falls rather under provincial jurisdiction.<sup>102</sup>

## Committee Observations and Recommendations

The enactment of an ARR by Parliament could face constitutional challenges. Indeed, while ARR is conceptually associated with copyright, it is closer in nature to a personal right attached to a tangible good. Section 91(23) of the *Constitution Act, 1867* provides Parliament the power to legislate over copyright matters, but the ARR could fall under provincial legislative powers under its section 92(13).

That being said, the Committee recognizes that, to be effective, an ARR would likely need to be national in scope. The Government should therefore play a leadership role in championing cooperation between provincial and territorial governments, Indigenous

95 INDU (2018), *Evidence*, 1540 (London, ADAC); Katz & Rub, *Brief Submitted to INDU*, 14 December 2018.

96 INDU (2018), *Evidence*, 1615 (London, ADAC); Katz & Rub, *Brief Submitted to INDU*, 14 December 2018.

97 INDU (2018), *Evidence*, 1530 (London, ADAC); Katz & Rub, *Brief Submitted to INDU*, 14 December 2018; ADAC, *Brief Submitted to INDU*, 17 October 2018.

98 CARFAC, *Brief Submitted to INDU*, 26 October 2018; ICSAC, *Brief Submitted to INDU*, 14 December 2018.

99 INDU (2018), *Evidence*, 1530 (London, ADAC).

100 INDU (2018), *Evidence*, 1705 (Guérin & Banza, RAAVQ).

101 INDU (2018), *Evidence*, 15 October 2018, 1650 (Robin Sokoloski, Playwrights Guild of Canada [PGC]). See also INDU (2018), *Evidence*, 1540 (Blackfield); INDU (2018), *Evidence*, 1625 (Belcourt); Belcourt, *Brief Submitted to INDU*, 14 December 2018.

102 Katz & Rub, *Brief Submitted to INDU*, 14 December 2018. See also ADAC, *Brief Submitted to INDU*, 17 October 2018.



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groups, and other stakeholders to implement the ARR in Canada. The Committee therefore recommends:

### Recommendation 9

**That the Government of Canada consult with provincial and territorial governments, Indigenous groups, and other stakeholders to explore the costs and benefits of implementing a national artist's resale right, and report on the matter to the House of Commons Standing Committee on Industry, Science and Technology within three years.**

The Committee agrees that artists of all ages should equally benefit from exhibition rights provided under section 3(1)(g) of the Act.<sup>103</sup> If the phrase “created after June 7, 1988” served a transitional purpose, the Committee considers that this transitional period should soon come to an end. The Committee therefore recommends:

### Recommendation 10

**That the Government of Canada consider amending the *Copyright Act* to remove the words “created after June 7, 1988,” from section 3(1)(g) of this Act, with no retroactive effect and providing stakeholders with a significant transitional period.**

## CROWN COPYRIGHT

Several witnesses criticized section 12 of the Act and called for its reform. In fact, no witness supported its continuation, at least in its current form—a rare point of consensus. Many of them proposed abolishing Crown copyright entirely, arguing that it creates unnecessary barriers to the use of works produced with public funds and that all government works should automatically enter the public domain.<sup>104</sup> Short of abolishing Crown copyright, some witnesses argued for its elimination for all government publications—including primary law, such as federal, provincial, and territorial

103 INDU (2018), *Evidence*, 1605 (Kinloch & Lloyd, WAC); INDU (2018), *Evidence*, 1535 (Yazbeck, CVA); INDU (2018), *Evidence*, 1550, 1620 (Guérin & Banza, RAAVQ); INDU (2018), *Evidence*, 1625 (Britski & Vettivelu, CARFAC); CARFAC, *Brief Submitted to INDU*, 26 October 2018; RAAVQ, *Brief Submitted to INDU*, 26 October 2018; CVA, *Brief Submitted to INDU*, 14 December 2018.

104 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1900 (Brianne Selman, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1905 (Susan Paterson, as an individual); INDU (2018), *Evidence*, 1645 (Merkley, CrCC); INDU (2018), *Evidence*, 1650 (Tribe & Aspiazu, OpenMedia); INDU (2018), *Evidence*, 1545 (Geist); Meera Nair, *Brief Submitted to INDU*, 31 May 2018; Angelstad et al., *Brief Submitted to INDU*, 14 December 2018; CAUT, *Brief Submitted to INDU*, 14 December 2018; CSC, *Brief Submitted to INDU*, 14 December 2018.



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legislation, as well as court and administrative tribunal decisions at all levels.<sup>105</sup> Other witnesses argued that Crown copyright is unique in Canadian law in allowing copyright on an unpublished work to last indefinitely.<sup>106</sup>

Witnesses also highlighted a lack of consistency in the administration of Crown copyright, which further obfuscates how Canadians can use different materials. Indeed, each federal, provincial, and territorial government administers its own copyrighted content, and practices may vary. At the federal level, the administration of copyrighted content further varies between departments.<sup>107</sup>

Some witnesses therefore suggested to uniformly licence all Crown copyright content under a Creative Commons licence.<sup>108</sup> Kelsey Merkley, CEO of Creative Commons, reported that the Australian government already licenses all government works under such a licence.<sup>109</sup>

While Mr. de Beer stated being in favour of abolishing Crown copyright, he reserved final judgment until the SCC issues a decision on the *Keatley Surveying* case, which “could either solve

**Witnesses also highlighted a lack of consistency in the administration of Crown copyright, which further obfuscates how Canadians can use different materials.**

105 INDU (2018), *Evidence*, 1535 (McColgan & Owen, CFLA); INDU (2018), *Evidence*, 1600 (Westwood, DFA); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1425 (Kim Nayyer, CALL); INDU (2018), *Evidence*, 1550 (Béland, Wikimedia Canada); INDU (2018), *Evidence*, 1640 (Merkley, CrCC); Creative Commons, *Brief Submitted to INDU*, 25 May 2018; Nair, *Brief Submitted to INDU*, 31 May 2018; DFA, *Brief Submitted to INDU*, 13 June 2018; Concordia University, McGill University, Université de Montréal & Université de Sherbrooke, *Brief Submitted to INDU*, 18 June 2018; Amanda Wakaruk, *Brief Submitted to INDU*, 22 June 2018; MacEwan University, *Brief Submitted to INDU*, 13 September 2018; Canadian Legal Information Institute, *Brief Submitted to INDU*, 21 September 2018; Southern Alberta Institute of Technology [SAIT], *Brief Submitted to INDU*, 21 September 2018; CAUL, *Brief Submitted to INDU*, 28 September 2018; University of Alberta, *Brief Submitted to INDU*, 20 November 2018; CPSLDBC, *Brief Submitted to INDU*, 4 December 2018; Angelstad et al., *Brief Submitted to INDU*, 14 December 2018; BAnQ, *Brief Submitted to INDU*, 14 December 2018; CSC, *Brief Submitted to INDU*, 14 December 2018; CAUT, *Brief Submitted to INDU*, 14 December 2018; Langara College, *Brief Submitted to INDU*, 14 December 2018; James Lee, *Brief Submitted to INDU*, 14 December 2018; LAA, *Brief Submitted to INDU*, 14 December 2018; CFLA, *Brief Submitted to INDU*, 20 December 2018; CALL, *Brief Submitted to INDU*, 7 January 2019; MRFHG, *Brief Submitted to INDU*, 7 January 2019. See also INDU (2018), *Evidence*, 1905 (Dryden); INDU (2018), *Evidence*, 1905 (Paterson); INDU (2018), *Evidence*, 1555 (Marrelli, CCA). See also CCA, *Brief Submitted to INDU*, 13 September 2018.

106 INDU (2018), *Evidence*, 1905 (Dryden); INDU (2018), *Evidence*, 1555 (Marrelli, CCA); BAnQ, *Brief Submitted to INDU*, 14 December 2018.

107 INDU (2018), *Evidence*, 1700 (Chisick).

108 INDU (2018), *Evidence*, 1705 (Geist); INDU (2018), *Evidence*, 1705 (Tarantino & Lovrics, IPIC).

109 INDU (2018), *Evidence*, 1715 (Merkley, CrCC).

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the problem or exacerbate it.”<sup>110</sup> Probably with this case in mind, Derek Graham, a professional surveyor, proposed to amend the Act to clarify that the “lodging or registering of a copyrightable document or work with a government body, such as a plan or text material, does not automatically transfer it to Her Majesty without the specific written permission of the author.”<sup>111</sup>

### Committee Observations and Recommendation

The *Keatley Surveying* case reveals that Crown copyright serves two distinct functions. The first function is to assert ownership over works prepared and published by or under the direction or control of Canadian governments. The second function allows Canadian governments to disseminate works they do not own for policy purposes, sometimes through private-public partnerships, and without having to request the authorization to do so. Section 12 of the Act must therefore be reviewed with both functions in mind.

The rationale under which Canadian governments would exercise copyright over publicly funded works they prepare and publish in the public interest is questionable at best. The current web of licensing agreements, orders, policies, and standing practices certainly does not promote the dissemination of these essential works. Exercising copyright over governmental publications created in the public interest should be the exception rather than the rule.

The Committee believes that the second function of Crown copyright remains relevant today. The public interest warrants authorizing Canadian governments to disseminate works to fulfill policy functions, including protecting the health and the safety of the public in emergency situations. However, as shown by measures taken in other jurisdictions where the distinct functions of Crown copyright are addressed in separate provisions,<sup>112</sup> providing such an authorization does not require an approach as drastic as transferring copyright ownership to the Crown. The Committee therefore recommends:

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110 INDU (2018), *Evidence*, 7120 (de Beer).

111 Derek Graham, *Brief Submitted to INDU*, 3 August 2018.

112 See for example *Copyright, Designs and Patent Acts 1988*, 1988 c. 48, s. 48, 50, 163-167 (United Kingdom) [CDPA]; *Copyright Act 1968*, No. 63, 1968, s. 176-182A, 183 (Australia); *Copyright Act 1994*, 1994 No 143, s. 26-28, 63, 64, 66 (New Zealand).



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## Recommendation 11

**That the Government of Canada improve Crown copyright management policies and practices by adopting open licences in line with the open government and data governance agenda, with respect to any work prepared and published:**

- By or under the direction or control of a Canadian government; and
- In the public interest and for the purpose of public use, education, research, or information.

**That the Government of Canada introduce legislation amending the *Copyright Act* to provide that no Canadian government or person authorized by a Canadian government infringe copyright when committing an act, either:**

- Under statutory authority; or
- For the purpose of national security, public safety, or public health.

**In the context of Crown copyright and acts done under statutory authority or for the purpose of national security, public safety, or public health, that the Government of Canada consider implementing measures to compensate rights-holders for acts done by a Canadian government or a person authorized by a Canadian government that would otherwise infringe copyright, when appropriate.**

**That the Crown exercise copyright protections that are reasonably in the public interest.**

## DEFINITION OF SOUND RECORDINGS

Numerous stakeholders, mostly from the music industry, proposed amending the definition of “sound recording” under the Act,<sup>113</sup> which currently “excludes any soundtrack of a cinematographic work where it accompanies the cinematographic

113 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1605, 1610 (Scott Long, Music Nova Scotia [MNS]); INDU (2018), *Evidence*, 1620 (Thompson & Hebb, ALAC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 June 2018, 1535 (Alan Willaert, Canadian Federation of Musicians [CFM]); INDU (2018), *Evidence*, 1545 (Lefebvre, GMMQ); INDU (2018), *Evidence*, 1550 (Henderson, Music Canada); INDU (2018), *Evidence*, 1540 (Baptiste & Daigle, SOCAN); INDU (2018), *Evidence*, 1555 (Drouin, ADISQ); INDU (2018), *Evidence*, 1705 (Tarlton, Ticketmaster); CFM, *Brief Submitted to INDU*, 31 May 2018; Barker, *Brief Submitted to INDU*, 14 December 2018; Music Canada, *Brief Submitted to INDU*, 14 December 2018; OMM, *Brief Submitted to INDU*, 14 December 2018. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 June 2018, 1725 (Erin Finlay & Stephen Stohn, Canadian Media Producers Association [CMePA]).

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work.”<sup>114</sup> Proponents of the amendment argue that performers and makers should earn royalties when sound recordings accompanying cinematographic works are “exhibited in theatres or broadcast on television or streamed on or downloaded from the Internet,” as well as “for the transmission of distant signals carrying television (and radio) programming.”<sup>115</sup> Removing the exclusion from the definition would allow performers and makers to benefit from a new stream of revenues, one from which authors (composers and songwriters) already benefit.<sup>116</sup>

The Canadian Association of Broadcasters (CAB) and the Movie Theatre Association of Canada (MTACT) urged the Committee to reject the proposal. Given that producers of a cinematographic work typically pay rights-holders for the inclusion of a sound recording up front, they claimed that the proposed amendment would result in paying performers and makers twice for the integration of their recording into a cinematographic work: first, during the production of a cinematographic work and, again, whenever the same work is publicly presented.<sup>117</sup> Such “double dipping” would increase the operational costs of broadcasting and exhibiting the accompanying cinematographic works by an estimated \$45 to \$50 million.<sup>118</sup> CAB and MTAC also believed that the proposed amendment would provide performers and makers significant control over the cinematographic works that include their sound recording, which could in turn hinder their distribution.<sup>119</sup> Finally, they warned the Committee that the proposed amendment would mainly benefit foreign record labels, as opposed to Canadian creators, and reduce the capability of Canadian broadcasters to invest in local productions.<sup>120</sup>

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114 *Copyright Act*, s. 2.

115 ALAC, *Brief Submitted to INDU*, 14 December 2018.

116 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 June 2018, 1540 (Annie Morin & Sophie Prigent, Artisti); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 12 June 2018, 1600 (Elliott Anderson & Laurie McAllister, Alliance of Canadian Cinema, Television and Radio Artists [ACTRA]); INDU (2018), *Evidence*, 1550 (MacKay, Re:Sound); SOCAN, *Brief Submitted to INDU*, 13 June 2018; CIMA, *Brief Submitted to INDU*, 14 December 2018.

117 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 September 2018, 1545-1550 (Michael Paris, Movie Theatre Association of Canada [MTAC]); MTAC, *Brief Submitted to INDU*, 28 September 2018; Canadian Association of Broadcasters [CAB], *Brief Submitted to INDU*, 13 September 2018. See also Hayes, *Brief Submitted to INDU*, 20 November 2018; Corus Entertainment Inc. [Corus], *Brief Submitted to INDU*, 14 December 2018.

118 INDU (2018), *Evidence*, 1635-1640 (Paris, MTAC); MTAC, *Brief Submitted to INDU*, 28 September 2018. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 November 2018, 1535 (Gerald Kerr-Wilson, Business Coalition for Balanced Copyright [BCBC]).

119 MTAC, *Brief Submitted to INDU*, 28 September 2018.

120 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 September 2018, 1545 (Nathalie Dorval & Susan Wheeler, CAB); CAB, *Brief Submitted to INDU*, 13 September 2018.



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## Committee Observations and Recommendation

Contrary to witnesses who opposed this proposal, including cinematographic works in the legal definition of sound recording would likely not result in a double-payment system. Instead, the Committee fears that performers would receive little (if any) payment up front for the integration of a sound recording in a cinematographic work, but would instead be asked to perceive later royalties—provided the cinematographic work is profitable or even released. The Committee is wary of recommending any measure that would compromise payments to performers, especially at a time when Canadian musicians and singers are among the few members of the music industry who do not benefit from this industry's growing revenues. The Committee therefore recommends:

### Recommendation 12

**That the Government of Canada maintain the definition of “sound recording” under section 2 of the *Copyright Act*.**

## OWNERSHIP OF CINEMATOGRAPHIC WORKS

Several witnesses debated to whom the Act should attribute first ownership of copyright in cinematographic works, the creation of which may involve several collaborators. Contrary to some other jurisdictions, the Act does not explicitly grant first ownership of copyright in such works to producers, directors or screenwriters.<sup>121</sup> Instead, first ownership is determined on a case-by-case basis under private agreements or, in their absence and in case of litigation, by the courts.<sup>122</sup> According to witnesses, increasing certainty about first ownership of copyright in cinematographic works would resolve ambiguities regarding the implementation of the Act *vis-à-vis* cinematographic works, notably to determine the term of their copyright.<sup>123</sup>

Much of the debate focused on who should be attributed first ownership of copyright in cinematographic works—between directors and screenwriters on the one hand, or

<sup>121</sup> INDU (2018), *Evidence*, 1610-1615 (Hayes).

<sup>122</sup> INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 1 October 2018, 1535 (Hélène Messier & Marie-Christine Beaudry, Association québécoise de la production médiatique [AQPM]); Directors Guild of Canada [DGC], *Brief Submitted to INDU*, 3 August 2018; WGC, *Brief Submitted to INDU*, 3 August 2018.

<sup>123</sup> INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 June 2018, 1720 (Maureen Parker & Neal McDougall, WGC); INDU (2018), *Evidence*, 1620 (Messier & Beaudry, AQPM); INDU (2018), *Evidence*, 1620 (Gabriel Pelletier & Mylène Cyr, Association des réalisateurs et réalisatrices du Québec [ARRQ]); INDU (2018), *Evidence*, 1530 (Chisick).

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producers on the other. Proponents of attributing it to directors and screenwriters highlighted that only they “exercise the skill and judgment that result in the expression of cinematographic works,”<sup>124</sup> whereas producers distribute and finance them.<sup>125</sup> They assured that such attribution would not disrupt business practices, given that it aligns with existing case law on the matter.<sup>126</sup> The fact that many producers often work on a single production would spread ownership among too many people and create further uncertainty.<sup>127</sup> Witnesses added that such an attribution would increase the bargaining power of directors and screenwriters so they can negotiate fair compensation for their work in Canada and internationally.<sup>128</sup>

Other witnesses argued that changing the rules governing the attribution of first ownership of copyright in cinematographic works in the Act would negatively impact current business practices, but if there is a change, producers should be recognized as the authors of cinematographic work.<sup>129</sup> They argued that matters of first ownership and licences are already covered by collective agreements of unions, allowing directors and screenwriters to receive royalties through those agreements.<sup>130</sup>

Some witnesses highlighted that producers often take an active creative role in the

**Much of the debate focused on who should be attributed first ownership of copyright in cinematographic works.**

124 INDU (2018), *Evidence*, 1625 (Parker & McDougall, WGC). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 June 2018, 1545 (Dave Forget & Tim Southam, DGC); INDU (2018), *Evidence*, 1550 (Plante & Hénault, SARTEC); INDU (2018), *Evidence*, 1555 (Pelletier & Cyr, ARRQ); INDU (2018), *Evidence*, 1550 (Schlittler & Lowe, SACD); DGC, *Brief Submitted to INDU*, 3 August 2018; WGC, *Brief Submitted to INDU*, 3 August 2018; ALAC, *Brief Submitted to INDU*, 14 December 2018; ARRQ, *Brief Submitted to INDU*, 14 December 2018; SARTEC, *Brief Submitted to INDU*, 14 December 2018; SACD & SCAM, *Brief Submitted to INDU*, 12 June 2018.

125 INDU (2018), *Evidence*, 1625 (Parker & McDougall, WGC); INDU (2018), *Evidence*, 1550, 1655 (Plante & Hénault, SARTEC).

126 INDU (2018), *Evidence*, 1545 (Forget & Southam, DGC); INDU (2018), *Evidence*, 1625 (Parker & McDougall, WGC); WGC, *Brief Submitted to INDU*, 3 August 2018; ARRQ, *Brief Submitted to INDU*, 14 December 2018. But see INDU (2018), *Evidence*, 1535 (Messier & Beaudry, AQPM).

127 DGC, *Brief Submitted to INDU*, 3 August 2018.

128 INDU (2018), *Evidence*, 1625, 1720 (Parker & McDougall, WGC); INDU (2018), *Evidence*, 1655 (Plante & Hénault, SARTEC); INDU (2018), *Evidence*, 1555, 1645 (Pelletier & Cyr, ARRQ); INDU (2018), *Evidence*, 1550 (Schlittler & Lowe, SACD). See also SACD & SCAM, *Brief Submitted to INDU*, 12 June 2018.

129 INDU (2018), *Evidence*, 1635 (Finlay & Stohn, CMePA); INDU (2018), *Evidence*, 1535 (Messier & Beaudry, AQPM); INDU (2018), *Evidence*, 1530 (Chisick). See also AQPM, *Brief Submitted to INDU*, 14 December 2018; CMePA, *Brief Submitted to INDU*, 14 December 2018.

130 INDU (2018), *Evidence*, 1710 (Finlay & Stohn, CMePA).



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production of cinematographic works, assume financial risks, and therefore need first ownership of such works to effectively commercialize them.<sup>131</sup> Moreover, the involvement of directors and screenwriters in the creation of cinematographic works varies from one production to another, whereas producers are always involved.<sup>132</sup>

## Committee Observations and Recommendation

A founding principle of copyright law is that, in most cases, the first owner of a copyright in a work should be its actual creator. When the effective creators of a cinematographic work are its screenwriter and director, they should be deemed its authors and first owners. However, the evidence shows that the creation of a cinematographic work does not always involve screenwriters and directors, notably because not all “cinematographic works”—within the meaning of the Act—originate from the movie and television industry. Attributing first ownership of copyright to specific types of creator risks producing too rigid a rule that cannot adapt to the diverse circumstances in which cinematographic works are created. The Government should look to other policy rationales to attribute first ownership of copyright over cinematographic works. The Committee therefore recommends:

### Recommendation 13

**That the Government of Canada update the rules governing first ownership of cinematographic works in light of the digital age and in consideration of maintaining competitiveness in a global market.**

## OWNERSHIP OF AI-GENERATED WORKS

A few witnesses raised the question of whether Parliament should grant copyright to works created by or with the help of artificial intelligence (AI). Dessa warned that denying “copyright protection to works created in tandem with AI would produce a chilling effect on investment and advancement in the nascent Canadian AI sector.”<sup>133</sup> IPIC submitted that Parliament could grant copyright protection to works created without a human author in certain circumstances. Mr. Tarantino, speaking as Chair of IPIC’s Copyright Policy Committee, suggested drawing inspiration from the British

131 Ibid., 1635 (Finlay & Stohn, CMePA).

132 INDU (2018), *Evidence*, 1545 (Messier & Beaudry, AQPM); INDU (2018), *Evidence*, 1610 (Hayes). See also Hayes, *Brief Submitted to INDU*, 20 November 2018.

133 Dessa, *Brief Submitted to INDU*, 14 December 2018. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1625-1630 (Maya Medeiros, as an individual).



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*Copyright, Designs and Patents Act 1988* (CDPA), which grants copyright in a computer-generated work to “the person by whom the arrangements necessary for the creation of the work are undertaken.”<sup>134</sup> Such wording would be similar to the one employed to define the “maker” of a cinematographic work or a sound recording under section 2 of the Act.<sup>135</sup>

Myra Tawfik, Professor of Law at the University of Windsor, argued that works generated by an AI without human intervention should not receive copyright protection.<sup>136</sup> Given that copyright legislation is meant to encourage human beings to create and disseminate works, the test to determine whether a work is original and, therefore, should be granted copyright should remain essentially the same, namely: “if a human being has exercised sufficient skill and judgment in the creation of that work using [AI], then they should be able to claim copyright.”<sup>137</sup> However, Dessa urged against presuming that a work generated by systems employing AI has been created exclusively by AI, given that “[h]uman skill and judgment are almost always required to direct such systems.”<sup>138</sup>

### Committee Observations and Recommendation

Parliament should enact legislation to help Canada’s promising future in artificial intelligence become reality. Our own legislation, perhaps informed by approaches taken in other jurisdictions, can be adapted to distinguish works made by humans with the help of AI-software from works created by AI without human intervention. The Committee therefore recommends:

#### Recommendation 14

**That the Government of Canada consider amending the *Copyright Act* or introducing other legislation to provide clarity around the ownership of a computer-generated work.**

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134 CDPA, s. 9(3).

135 IPIC, *Brief Submitted to INDU*, 4 December 2018.

136 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 December 2018, 1720 (Myra Tawfik, as an individual). See also Tawfik et al., *Brief Submitted to INDU*, 18 January 2019.

137 INDU (2018), *Evidence*, 1720 (Tawfik).

138 Dessa, *Brief Submitted to INDU*, 14 December 2018.



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## REMUNERATION RIGHT FOR JOURNALISTIC WORKS

Inspired by similar proposals made in Europe, the Fédération nationale des communications (FNC) proposed granting journalists and news publishers a remuneration right under the Act.<sup>139</sup> Similarly to other neighbouring rights,<sup>140</sup> the Act would require that journalists be remunerated whenever their “journalistic work” is reproduced and communicated to the public on the Internet. FNC called for the Government to support the creation of one or more collective societies to manage this remuneration right to the benefit of the rights-holders and to request the Board to set a tariff for the use of journalistic works on the web. The FNC proposed additional ways to collect and distribute royalties under the basis of such a new remuneration right.<sup>141</sup> The proposal stems from the growing influence of OSPs over the distribution of news media. FNC and News Media Canada claimed that not only do Google and Facebook now capture the lion’s share of the advertising revenues, but OSPs fail to compensate Canadian journalists and news publishers for the unauthorized reproduction and communication of their works on the digital platforms they operate, such as news aggregators.<sup>142</sup>

**The proposal [to grant journalists and news publishers a remuneration right] stems from the growing influence of OSPs over the distribution of news media.**

In response to FNC’s proposal, Kevin Chan, Head of Public Policy at Facebook, expressed confusion about how the remuneration right would work given that individual users—including publishers—and not Facebook itself “are actually putting individual pieces of content on [Facebook’s] platform.”<sup>143</sup> While Chan conceded that Facebook should and would remove content shared by a unauthorized user on its platform, he argued that news publishers themselves authorize—in one way or

139 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1645, 1705 (Normand Tamaro & Pascale St-Onge, Fédération nationale des communications [FNC]); FNC, *Brief Submitted to INDU*, 18 May 2018.

140 *Copyright Act*, s. 15 et seq.

141 INDU (2018), *Evidence*, 1740, 1800, 1805 (Tamaro & St-Onge, FNC). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1905 (Alain Brunet).

142 INDU (2018), *Evidence*, 1645, 1705 (Tamaro & St-Onge, FNC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 29 May 2018, 1545, 1700 (John Hinds, News Media Canada [NMC]); FNC, *Brief Submitted to INDU*, 18 May 2018. See also INDU (2018), *Evidence*, 1655 (Gendreau).

143 INDU, *Evidence*, 1<sup>st</sup> session, 42<sup>nd</sup> Parliament, 26 November 2018, 1635 (Kevin Chan & Probir Mehta, Facebook).

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another—their content to be shared on Facebook, notably because it increases traffic on their website.<sup>144</sup> Mr. Geist observed that when other jurisdictions implemented measures similar to the FNC's proposal, OSPs stopped disseminating the protected content, which proved even more damaging to publishers.<sup>145</sup> Mr. Knopf also noted that journalists are already remunerated for their work through their salary.<sup>146</sup>

### Committee Observations and Recommendation

The production and dissemination of news content is essential to democratic societies. While the Committee supports the notion that OSPs who profit from the dissemination of copyrighted content they do not own should fairly remunerate its rights-holders, legislators around the world are only starting to develop and implement legislative frameworks to compel OSPs to do so. Canada should learn from the failures and successes of these initiatives to determine whether they serve the interests of Canadians. The Committee therefore recommends:

#### Recommendation 15

**That the House of Commons Standing Committee on Canadian Heritage consider conducting a study to investigate the remuneration of journalists, the revenues of news publishers, the licences granted to online service providers and copyright infringement on their platforms, the availability and use of online services, and competition and innovation in online markets, building on their previous work on Canada's media landscape.**

### RETRANSMISSION RIGHT

The Committee received proposals to amend section 31 of the Act,<sup>147</sup> including providing broadcasters with the right to authorize the retransmission of a signal.<sup>148</sup> Section 31 allows the retransmission of broadcast signals carrying copyrighted content providing that the “retransmitter” meets certain requirements, including paying a tariff

144 Ibid., 1640 (Chan & Mehta, Facebook).

145 INDU (2018), *Evidence*, 1650 (Geist).

146 INDU (2018), *Evidence*, 1720 (Knopf).

147 CMePA, *Brief Submitted to INDU*, 14 December 2018; Canadian Retransmission Collective, *Brief Submitted to INDU*, 14 December 2018.

148 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 12 June 2018, 1540, 1710 (Franbis Schiller, Border Broadcasters).



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fixed by the Board.<sup>149</sup> Border Broadcasters affirmed that a right to authorize retransmission would allow American broadcasters to obtain fair compensation for retransmissions made by Canadian operators and assist in reporting Canadian viewership of American television services. Shaw Communications Inc. (Shaw) opposed the proposal, claiming that it “would force cable, satellite and [Internet Protocol television] subscribers to pay significant new fees for the same signals they have received for decades, lose access to these signals, or both, while creating no new value.”<sup>150</sup>

### Committee Observations

The Committee considers that problems that the broadcast transmission regime raises for US broadcasters would be better addressed in the context of Canada-US trade relations or through representations made by these broadcasters or their representatives before the Board.

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149 Copyright Act, s. 31(2).

150 Shaw Communications Inc. [Shaw], *Brief Submitted to INDU*, 14 December 2018. See also Canadian Communication Systems Alliance, *Brief Submitted to INDU*, 13 September 2018.

## EXCEPTIONS

### EDUCATIONAL FAIR DEALING

Several witnesses claimed that introducing educational fair dealing in 2012 inflicted a significant loss of revenues to publishers, creators and others. In their view, the situation deteriorated after several educational institutions across the country opted out of collective licensing to instead rely on what some witnesses depicted as ill-founded fair dealing guidelines that enable copyright infringement on an unprecedented scale and continue to remain in place despite the fact that the Federal Court in *York* considered them unfair.<sup>151</sup> Emboldened by overly broad and unclear direction from Parliament and

151 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 April 2018, 1550, 1625 (Laurent Dubois & Suzanne Aubry, Union des écrivaines et des écrivains du Québec [UNEQ]); INDU (2018), *Evidence*, 1530, 1610, 1620, 1630 (Rollans & Edwards, ACP); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 April 2018, 1545, 1610, 1625, 1630, 1635, 1655 (John Degen, WUC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1430 (Terrilee Bulger, Nimbus Publishing); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1910 (Brett McLenithan, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1920 (Harry Thurston, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1505 (Richard Prieur, Association nationale des éditeurs de livre [ANEL]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1915 (Sylvie Van Brabant, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1920 (Melikah Abdelmoumen, as an individual); INDU (2018), *Evidence*, 1405, 1450 (Hebb & Harnum, CCI); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1410, 1455 (Hugo Setzer, International Publishers Association [IPA]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1600 (David Caron, Ontario Book Publishers Organization [OBPO]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1605, 1635, 1715, 1725 (Sylvia McNicoll, Canadian Society of Children's Authors, Illustrators and Performers [CSCAIP]); INDU (2018), *Evidence*, 1620 (Thompson & Hebb, ALAC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1920 (Leslie Dema, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1915 (Todd Besant, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1615 (Jerry Thompson, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1415, 1510 (Lorimer, Canadian Association of Learned Journals [CALJ]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1910 (Georges Opacic); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 22 May 2018, 1645-1650, 1725 (Roanie Levy, Access Copyright); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 12 June 2018, 1535-1540, 1640 (Hugo Desrosiers & Jean-François Cormier, Audio Cine Films); INDU (2018), *Evidence*, 1535 (Yazbeck, CVA); INDU (2018), *Evidence*, 1555 (Guérin & Banza, RAAVQ); INDU (2018), *Evidence*, 1735 (Sheffer); Broadview Press, *Brief Submitted to INDU*, 16 April 2018; UNEQ, *Brief Submitted to INDU*, 24 April 2018; Association of Book Publishers of British Columbia [ABPBC], *Brief Submitted to INDU*, 22 May 2018; Copibec, *Brief Submitted to INDU*, 31 May 2018; WUC, *Brief Submitted to INDU*, 18 June 2018; Djanka Gajdel, *Brief Submitted to INDU*, 22 June 2018; ACP, *Brief Submitted to INDU*, 3 August 2018; Fernwood Publishing, *Brief Submitted to INDU*, 3 August 2018; Brush Education, *Brief Submitted to INDU*, 5 September 2018; Access Copyright, *Brief Submitted to INDU*, 7 September 2018; RAAVQ, *Brief Submitted to INDU*, 26 October 2018; CAA, *Brief Submitted to INDU*, 14 December 2018; International Federation of Reproduction Rights Organisations [IFRRO], *Brief Submitted to INDU*, 14 December 2018. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1910 (Emmanuelle Bruno, as an individual); Donald Patriquin, *Brief Submitted to INDU*, 31 May 2018; Derek Graham, *Brief Submitted to INDU*, 3 August 2018.



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the SCC, universities, colleges, and K-12 schools across Canada allegedly rely heavily on fair dealing to reproduce works without fair compensation. The withdrawal of educational institutions from collective licensing would have resulted in a loss of \$30 million in collected royalties for the Canadian publishing industry.<sup>152</sup>

Individual publishers<sup>153</sup> and creators<sup>154</sup> testified that the implementation of educational fair dealing led to a decrease in the royalties perceived from collective societies, especially Access Copyright, which resulted in significant revenue losses.<sup>155</sup> Based on its own experience, Fernwood Publishing argued that such losses threaten the viability of the Canadian publishing industry:

Fernwood's revenue from post-secondary institution courses has plummeted from above 75% historically to just over 40% of total sales in the last fiscal year. The misuse of fair dealings has also impeded Fernwood's commitment to innovation: Fernwood has also been very reluctant to produce digital versions of books destined for the post-secondary market, unlike books destined for other markets which are produced simultaneously in print and digital. Given the unknown levels of copying, we are

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- 152 INDU (2018), *Evidence*, 1550 (Dubois & Aubry, UNEQ); INDU (2018), *Evidence*, 1410 (Bulger, Nimbus Publishing); INDU (2018), *Evidence*, 1615 (Thompson); INDU (2018), *Evidence*, 1645, 1710 (Levy, Access Copyright); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 29 May 2018, 1535-1540, 1600 (David Swail, Canadian Publishers Council [CPC]); UNEQ, *Brief Submitted to INDU*, 24 April 2018; ANEL, *Brief Submitted to INDU*, 18 May 2018; ABPBC, *Brief Submitted to INDU*, 22 May 2018; Access Copyright, *Brief Submitted to INDU*, 7 September 2018. See also INDU (2018), *Evidence*, 1535 (Yazbeck, CVA); ACP, *Brief Submitted to INDU*, 3 August 2018.
- 153 INDU (2018), *Evidence*, 1410 (Bulger, Nimbus Publishing); INDU (2018), *Evidence*, 1910 (McLenithan); INDU (2018), *Evidence*, 1600 (Caron, OBPO); INDU (2018), *Evidence*, 1920 (Dema); Broadview Press, *Brief Submitted to INDU*, 16 April 2018; Brush Education, *Brief Submitted to INDU*, 5 September 2018; Fernwood Publishing, *Brief Submitted to INDU*, 3 August 2018.
- 154 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1905 (Carol Bruneau, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1925 (Jill MacLean, as an individual), 1925; INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1910 (Pierre-Michel Tremblay, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1400 (Patricia Robertson, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1910 (Irene Gordon, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1920 (Laurie Nealin, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1905 (Joan Thomas, as an individual). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1900 (Sandy Greer, as an individual).
- 155 INDU (2018), *Evidence*, 1550 (Dubois & Aubry, UNEQ); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1640 (James Lorimer, Canadian Publishers Hosted Software Solutions [CPHSS]); INDU (2018), *Evidence*, 1905 (Bruneau); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1935 (Jean Lachapelle, as an individual); INDU (2018), *Evidence*, 1435 (Hebb & Harnum, CCI); INDU (2018), *Evidence*, 1600 (Caron, OBPO); INDU (2018), *Evidence*, 1605 (Kinloch & Lloyd, WAC); INDU (2018), *Evidence*, 1550 (Peets, PWAC); INDU (2018), *Evidence*, 1535 (Yazbeck, CVA); IPA, *Brief Submitted to INDU*, 9 May 2018; ABPBC, *Brief Submitted to INDU*, 22 May 2018; SNE, *Brief Submitted to INDU*, 22 June 2018; Fernwood Publishing, *Brief Submitted to INDU*, 3 August 2018; CARFAC, *Brief Submitted to INDU*, 26 October 2018; RAAVQ, *Brief Submitted to INDU*, 26 October 2018.

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concerned that digital versions will simply be copied as course resources. For us, producing for the post-secondary market is becoming unsustainable.<sup>156</sup>

While a few witnesses recommended removing the word “education” from section 29 of the Act,<sup>157</sup> many more urged instead that the Act be amended to clarify educational fair dealing so as to stop a damaging pattern of rampant copyright infringement in education. Proponents of clarifying educational fair dealing suggested different avenues to the Committee.<sup>158</sup> However, most stakeholders from the Canadian publishing sector rallied around a single proposal: amending the Act to clarify “that fair dealing does not apply to educational institutions when the work is commercially available.”<sup>159</sup> This amendment, they argued, “will ensure creators are justly compensated for the mass and systemic use of their works by the educational sector.”<sup>160</sup>

156 Fernwood Publishing, *Brief Submitted to INDU*, 3 August 2018. See also INDU (2018), *Evidence*, 1540 (Swaill, CPC); Broadview Press, *Brief Submitted to INDU*, 16 April 2018; Brush Education, *Brief Submitted to INDU*, 5 September 2018.

157 INDU (2018), *Evidence*, 1545 (Degen, WUC); INDU (2018), *Evidence*, 1605 (McNicol, CSCAIP); WUC, *Brief Submitted to INDU*, 18 June 2018; CAA, *Brief Submitted to INDU*, 14 December 2018. See also INDU, *Evidence*, 1st Session, 42nd Parliament, 8 May 2018, 1910 (Martin Vallières, as an individual); INDU (2018), *Evidence*, 1555 (Plante & Hénault, SARTEC).

158 INDU (2018), *Evidence*, 1605 (Dubois & Aubry, UNEQ); INDU (2018), *Evidence*, 1405, 1455 (Hebb & Harnum, CCI); INDU (2018), *Evidence*, 1410 (Setzer, IPA); INDU (2018), *Evidence*, 1710 (McNicol, CSCAIP); INDU (2018), *Evidence*, 1415 (Lorimer, CALJ); INDU (2018), *Evidence*, 1710, 1715 (Swaill, CPC); INDU (2018), *Evidence*, 1535 (Yazbeck, CVA); INDU (2018), *Evidence*, 1625 (Britski & Vettivelu, CARFAC); UNEQ, *Brief Submitted to INDU*, 24 April 2018; A.J.B. Johnston, *Brief Submitted to INDU*, 18 May 2018; ANEL, *Brief Submitted to INDU*, 18 May 2018; SNE, *Brief Submitted to INDU*, 22 June 2018; Access Copyright, *Brief Submitted to INDU*, 7 September 2018; CCI, *Brief Submitted to INDU*, 21 September 2018; RAAVQ, *Brief Submitted to INDU*, 26 October 2018; ALAC, *Brief Submitted to INDU*, 14 December 2018; CAA, *Brief Submitted to INDU*, 14 December 2018; CVA, *Brief Submitted to INDU*, 14 December 2018; IFRRO, *Brief Submitted to INDU*, 14 December 2018. See also Australian Copyright Council, Australian Publishers Association, Australian Society of Authors & Copyright Agency, *Brief Submitted to INDU*, 12 June 2018; Derek Graham, *Brief Submitted to INDU*, 3 August 2018; Copyright Licensing New Zealand, *Brief Submitted to INDU*, 14 December 2018.

159 Access Copyright, ANEL, ABPBC, ACP, Association of Manitoba Book Publishers [AMBP], Atlantic Publishers Marketing Association, Book Publishers Association of Alberta, CARFAC, CALJ, CAPIC, CAA, CCO, CPC, CSCAIP, Copibec, CVA, Federation of British Columbia Writers, League of Canadian Poets, Literary Press Group of Canada, NMC, Outdoor Writers of Canada, PGC, PWAC, Quebec Writers' Federation, RAAVQ, Saskatchewan Publishers Group, WUC, UNEQ, Writers' Guild of Alberta, Writers' Alliance of Newfoundland and Labrador, Writers' Federation of New Brunswick, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1620, 1630 (Degen, WUC); INDU (2018), *Evidence*, 1620, 1640 (Lorimer, CPHSS); INDU (2018), *Evidence*, 1605 (Kinloch & Lloyd, WAC); INDU (2018), *Evidence*, 1650 (Levy, Access Copyright); INDU, *Evidence*, 1st Session, 42nd Parliament, 22 May 2018, 1700 (Frédérique Couette, Copibec); INDU (2018), *Evidence*, 1710 (Sheffer); IPA, *Brief Submitted to INDU*, 9 May 2018; Copibec, *Brief Submitted to INDU*, 31 May 2018; WUC, *Brief Submitted to INDU*, 18 June 2018; RAAVQ, *Brief Submitted to INDU*, 26 October 2018; CARFAC, *Brief Submitted to INDU*, 26 October 2018.

160 Access Copyright et al., *Brief Submitted to INDU*, 14 December 2018.



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The proposal relies on the legal definition of “commercially available.”<sup>161</sup> Should Parliament endorse it, educational fair dealing would not be available when the copyrighted content is available on the Canadian market or when a licence can be obtained from a collective society “within a reasonable time and for a reasonable price and may be located with reasonable effort.”<sup>162</sup> The proposal would support the re-establishment of collective licensing in the educational sector—an outcome supported by several stakeholders<sup>163</sup>—and, according to Frédérique Couette, executive director of Copibec, would “allow students to meet their personal research requirements for their homework, for instance, whereas all institutional aspects would be covered by the [collective] licence.”<sup>164</sup> Stakeholders did not specify how the standard of reasonableness would apply in the educational context.

**Individual publishers and creators testified that the implementation of educational fair dealing led to a decrease in the royalties perceived from collective societies.**

In contrast, several witnesses disputed the claims that there is large-scale copyright infringement in the sector, noting that the difficulties faced by the publishing industry predate 2012 and are international in scope. Instead, they said that several overlapping factors are responsible for losses of revenues felt by the publishing industry in the educational sector, including a substantial shift to digital content, an increasing focus on open educational resources, and growing practices such as textbook rentals and peer-to-peer selling.<sup>165</sup>

161 Copibec, *Brief Submitted to INDU*, 31 May 2018; Access Copyright, *Brief Submitted to INDU*, 7 September 2018.

162 *Copyright Act*, s. 2.

163 INDU (2018), *Evidence*, 1530 (Rollans & Edwards, ACP); INDU (2018), *Evidence*, 1545 (Degen, WUC); INDU (2018), *Evidence*, 1510 (Bulger, Nimbus Publishing); INDU (2018), *Evidence*, 1505 (Prieur, ANEL); INDU (2018), *Evidence*, 1600 (Caron, OBPO); ACP, *Brief Submitted to INDU*, 3 August 2018; WUC, *Brief Submitted to INDU*, 18 June 2018; ABPBC, *Brief Submitted to INDU*, 22 May 2018.

164 INDU (2018), *Evidence*, 1700 (Couette, Copibec). See also INDU (2018), *Evidence*, 1655 (Levy, Access Copyright).

165 INDU (2018), *Evidence*, 1615 (Kiddell, CFS); INDU (2018), *Evidence*, 1635 (Foster & Jones, CAUT); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 April 2018, 1640 (Shawn Gilbertson, CSC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 April 2018 (Michael McDonald, Canadian Alliance of Student Associations [CASA]); INDU (2018), *Evidence*, 1605, 1650 (Amyot & Hanna, CIC); INDU (2018), *Evidence*, 1535 (McColgan & Owen, CFLA); INDU (2018), *Evidence*, 1450, 1455, 1505 (Stewart & Bourne-Tyson, CAUL); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1535, 1550 (Guylaine Beaudry & Nicolas Sapp, Concordia



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Several witnesses, including students and student organizations,<sup>166</sup> argued that limiting the application of educational fair dealing in any manner would severely restrict the dissemination of learning materials<sup>167</sup>—in- and outside of educational institutions.<sup>168</sup> For

University); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1625 (Ann Ludbrook, Ryerson University); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1635 (Joy Muller, Colleges Ontario); INDU (2018), *Evidence*, 1405, 1430 (Bell & Parker, UBC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 May 2018, 1540 (Cynthia Andrew, Canadian School Boards Association [CSBA]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 May 2018, 1635 (Dru Marshall, University of Calgary); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 May 2018, 1530 (H. Mark Ramsankar, Canadian Teachers' Federation [CTF]); INDU (2018), *Evidence*, 1705 (Merkley, CrCC); University of Calgary, *Brief Submitted to INDU*, 5 September 2018; CFS, *Brief Submitted to INDU*, 14 December 2018; University of Victoria, *Brief Submitted to INDU*, 14 December 2018. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1935 (Julie Barlow, as an individual).

166 INDU (2018), *Evidence*, 1540 (Kiddell, CFS); INDU (2018), *Evidence*, 1535, 1620 (McDonald, CASA); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1900 (Alison Balcom, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1915 (Denis Amirault, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1915, (Ossama Nasrallah, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1920 (Jordan Ferguson, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1510, 1545, 1615 (Guillaume Lecorps, Union étudiante du Québec [UEQ]); INDU (2018), *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1930 (Matis Allali, as an individual); INDU (2018), *Evidence*, 1910 (Macklem); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1920 (Noah Berson, as an individual); Undergraduates of Canadian Research-Intensive Universities [UCRIU], *Brief Submitted to INDU*, 13 September 2018; Ryerson Students' Union [RSU], *Brief Submitted to INDU*, 4 December 2018; CFS, *Brief Submitted to INDU*, 14 December 2018.

167 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 April 2018, 1535, 1620 (Paul Davidson & Wendy Therrien, Universities Canada); INDU (2018), *Evidence*, 1535 (McColgan & Owen, CFLA); INDU (2018), *Evidence*, 1400 (Stewart & Bourne-Tyson, CAUL); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1405 (H.E.A. Eddy Campbell & Lesley Balcom, UNB); INDU (2018), *Evidence*, 1415 (Workman, ANSUT); INDU (2018), *Evidence*, 1520, 1530, 1550 (Beaudry & Sapp, Concordia University); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1915 (Eli MacLaren, as an individual); INDU (2018), *Evidence*, 1615 (Muller, Colleges Ontario); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1920 (Michael Serebriakov, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 22 May 2018, 1600 (Wanda Noel & Hon. Zach Churchill, Council of Ministers of Education, Canada [CMEC]); INDU (2018), *Evidence*, 1530 (Andrew, CSBA); INDU (2018), *Evidence*, 1540, 1600 (Marshall, University of Calgary); INDU (2018), *Evidence*, 1640 (Merkley, CrCC); Nair, *Brief Submitted to INDU*, 31 May 2018; DFA, *Brief Submitted to INDU*, 13 June 2018; Concordia University et al., *Brief Submitted to INDU*, 18 June 2018; CASA, *Brief Submitted to INDU*, 4 July 2018; University of Guelph, *Brief Submitted to INDU*, 4 July 2018; CIC, *Brief Submitted to INDU*, 3 August 2018; CMEC, *Brief Submitted to INDU*, 5 September 2018; University of Calgary, *Brief Submitted to INDU*, 5 September 2018; University of Winnipeg, *Brief Submitted to INDU*, 5 September 2018; CCA, *Brief Submitted to INDU*, 13 September 2018; Université Laval, *Brief Submitted to INDU*, 21 September 2018; CARL, *Brief Submitted to INDU*, 28 September 2018; CRKN, *Brief Submitted to INDU*, 28 September 2018; University of Lethbridge, *Brief Submitted to INDU*, 28 September 2018; Canadian Urban Libraries Council [CULC], *Brief Submitted to INDU*, 12 October 2018; BCLA, *Brief Submitted to INDU*, 20 November 2018; CPSLDBC, *Brief Submitted to INDU*, 4 December 2018; Athabasca University, *Brief Submitted to INDU*, 14 December 2018; BAnQ, *Brief Submitted to INDU*, 14 December 2018; ECUAD, *Brief Submitted to INDU*, 14 December 2018; Langara College, *Brief Submitted to INDU*, 14 December 2018; Ryerson University, *Brief Submitted to INDU*, 14 December 2018; University of Waterloo, *Brief Submitted to INDU*, 14 December 2018; Western University, *Brief Submitted to INDU*, 14 December 2018.

168 Association québécoise pour l'éducation à domicile [AQED], *Brief Submitted to INDU*, 14 December 2018.



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example, Sherri Rollins, Chair of the Board of Trustees of the Winnipeg School Division No. 1 (WSD), noted that fair dealing helps limit the cost of learning materials and, in doing so, facilitates access to education for Indigenous students and students from low-income communities.<sup>169</sup> When questioned on the matter that WSD only pays approximately \$34,000 towards copyright licensing out of a total budget of \$396 million, Ms. Rollins responded that cuts in public funding made WSD unable to afford collective licences, even at an estimated rate of \$2 per student.<sup>170</sup>

Many witnesses denied claims of rampant copyright infringement in educational institutions, arguing that the education sector largely complies with the law.<sup>171</sup> They maintained that existing fair dealing guidelines reflect Canadian law and established practices, and regulate the implementation of fair dealing in education rather than encouraging abuses.<sup>172</sup> Educational institutions rely on multiple means to ensure copyright compliance, such as holding awareness campaigns, producing and disseminating education materials, providing training to staff and students, and having copyright clearance officers oversee the use of copyrighted content with the help of learning management systems.<sup>173</sup>

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- 169 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1420 (Sherri Rollins, Winnipeg School Division No. 1 [WSD]). See also Education International, *Brief Submitted to INDU*, 13 September 2018; CULC, *Brief Submitted to INDU*, 12 October 2018.
- 170 INDU (2018), *Evidence*, 1445 (Rollins, WSD).
- 171 INDU (2018), *Evidence*, 1505 (Campbell & Balcom, UNB); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1910 (Roger Gillis, as an individual); INDU (2018), *Evidence*, 1550, 1615 (Noel & Churchill, CMEC); INDU (2018), *Evidence*, 1540, 1605, 1615, 1625 (Andrew, CSBA); INDU (2018), *Evidence*, 1530, 1610, 1645 (Ramsankar, CTF); INDU (2018), *Evidence*, 1700 (Craig); CTF, *Brief Submitted to INDU*, 21 September 2018; Nick Mount, *Brief Submitted to INDU*, 4 December 2018.
- 172 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2019, 1415, 1450 (Heather Martin & Rebecca Graham, University of Guelph); INDU (2018), *Evidence*, 1645 (Callison); INDU (2018), *Evidence*, 1530 (Andrew, CSBA); MRU, *Brief Submitted to INDU*, 18 June 2018; University of Guelph, *Brief Submitted to INDU*, 4 July 2018; CMEC, *Brief Submitted to INDU*, 5 September 2018; MacEwan University, *Brief Submitted to INDU*, 13 September 2018; CTF, *Brief Submitted to INDU*, 21 September 2018; Université Laval, *Brief Submitted to INDU*, 21 September 2018; CAUL, *Brief Submitted to INDU*, 28 September 2018; Athabasca University, *Brief Submitted to INDU*, 14 December 2018; Langara College, *Brief Submitted to INDU*, 14 December 2018.
- 173 INDU (2018), *Evidence*, 1535 (Davidson & Therrien, Universities Canada); INDU (2018), *Evidence*, 1620 (Kiddell, CFS); INDU (2018), *Evidence*, 1400 (Stewart & Bourne-Tyson, CAUL); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 May 2018, 1905 (Joshua Dickson, as an individual); INDU (2018), *Evidence*, 1415 (Martin & Graham, University of Guelph); INDU (2018), *Evidence*, 1700 (Ludbrook, Ryerson University); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1515 (Althea Wheeler, Mary-Jo Romaniuk & Naomi Andrew, University of Manitoba); INDU (2018), *Evidence*, 1435, 1450 (Bell & Parker, UBC); INDU (2018), *Evidence*, 1605 (Noel & Churchill, CMEC); INDU (2018), *Evidence*, 1615, 1645, 1650 (Andrew, CSBA); INDU (2018), *Evidence*, 1645 (Ramsankar, CTF); INDU (2018), *Evidence*, 1635 (Marshall, University of Calgary); Concordia University et al., *Brief Submitted to INDU*, 18 June 2018; University of Calgary, *Brief Submitted to INDU*, 5 September 2018; CARL, *Brief Submitted to INDU*, 28 September 2018; CAUL, *Brief Submitted to*

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Several witnesses highlighted that, rather than overstretching the scope of fair dealing to avoid paying for copyrighted content, educational institutions spend increasing amounts on the lawful acquisition of learning materials, largely in digital form from a variety of distributors, including large, subscription-based content aggregators. They claimed that the main reason they opted out of Access Copyright's blanket licence was that it did not compete with new market alternatives that better suit the needs of educational institutions, such as arrangements providing both access and licence to content. They therefore urged the Committee to allow new alternatives to flourish instead of forcing educational institutions, faculty, and students back into inefficient licensing models that do not suit their needs.<sup>174</sup>

Whether it is due to educational fair dealing or not, the withdrawal of Canadian educational institutions from Access Copyright's licence has led to a decrease of collected royalties that allegedly amounts to \$30 million per year. Access Copyright would have otherwise distributed a significant portion of these royalties to its affiliated publishers and creators, many of which testified that their revenues have severely

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*INDU*, 28 September 2018; University of Lethbridge, *Brief Submitted to INDU*, 28 September 2018; UNB, *Brief Submitted to INDU*, 4 December 2018; NorQuest College, *Brief Submitted to INDU*, 14 December 2018; Langara College, *Brief Submitted to INDU*, 14 December 2018; University of Victoria, *Brief Submitted to INDU*, 14 December 2018. But see *INDU*, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1920 (Michal Jaworski, as an individual).

174 *INDU* (2018), *Evidence*, 1535, 1550, 1630 (Davidson & Therrien, Universities Canada); *INDU* (2018), *Evidence*, 1655, 1700-1705 (Gilbertson, CSC); *INDU*, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 April 2018, 1640, 1700 (Mark Swartz & Susan Haigh, CARL); *INDU* (2018), *Evidence*, 1535 (McColgan & Owen, CFLA); *INDU* (2018), *Evidence*, 1605, 1650 (Amyot & Hanna, CIC); *INDU* (2018), *Evidence*, 1400, 1455 (Stewart & Bourne-Tyson, CAUL); *INDU* (2018), *Evidence*, 1525, 1610 (Beaudry & Sapp, Concordia University); *INDU* (2018), *Evidence*, 1705 (Muller, Colleges Ontario); *INDU* (2018), *Evidence*, 1625 (Ludbrook, Ryerson University); *INDU* (2018), *Evidence*, 1415, 1435, 1500, 1520 (Wheeler, Romaniuk & Andrew, University of Manitoba); *INDU* (2018), *Evidence*, 1905 (Elves); *INDU* (2018), *Evidence*, 1405 (Bell & Parker, UBC); *INDU*, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1925 (Kim Nayyer, as an individual); *INDU* (2018), *Evidence*, 1610 (Noel & Churchill, CMEC); *INDU* (2018), *Evidence*, 1600, 1605, 1620, 1645 (Andrew, CSBA); *INDU* (2018), *Evidence*, 1540-1545, 1630, 1635, 1640 (Marshall, University of Calgary); *INDU* (2018), *Evidence*, 1645 (Ramsankar, CTF); *INDU* (2018), *Evidence*, 1540, 1630, 1635 (Geist); Mark A. McCutcheon, *Brief Submitted to INDU*, 18 May 2018; MRU, *Brief Submitted to INDU*, 18 June 2018; University of Calgary, *Brief Submitted to INDU*, 5 September 2018; Kenneth Field, *Brief Submitted to INDU*, 13 September 2018; MacEwan University, *Brief Submitted to INDU*, 13 September 2018; QLA, *Brief Submitted to INDU*, 13 September 2018; UCRIU, *Brief Submitted to INDU*, 13 September 2018; SAIT, *Brief Submitted to INDU*, 21 September 2018; UBC, *Brief Submitted to INDU*, 21 September 2018; IFLAI, *Brief Submitted to INDU*, 12 October 2018; RSU, *Brief Submitted to INDU*, 4 December 2018; UNB, *Brief Submitted to INDU*, 4 December 2018; Alberta College of Art and Design [ACAD], *Brief Submitted to INDU*, 14 December 2018; CSC, *Brief Submitted to INDU*, 14 December 2018; Heather Morrison, *Brief Submitted to INDU*, 14 December 2018; NorQuest College, *Brief Submitted to INDU*, 14 December 2018; Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic [CIPPIC], *Brief Submitted to INDU*, 14 December 2018; University of Manitoba, *Brief Submitted to INDU*, 14 December 2018; University of Victoria, *Brief Submitted to INDU*, 14 December 2018; CALL, *Brief Submitted to INDU*, 7 January 2019. See also *INDU* (2018), *Evidence*, 1615, 1640 (Lorimer, CPHSS).



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decreased since 2012.<sup>175</sup> Several witnesses therefore urged the Government to encourage educational institutions to return to collective licensing—notably through financial pressures<sup>176</sup>—to restore remuneration to rights-holders, support Canadian publishers and creators, and still provide convenient licensing of copyrighted content at a very affordable price for the education sector.<sup>177</sup>

A few witnesses contradicted the claim that collective licensing provides significant financial support to Canadian publishers and writers. They noted, for example, that royalties distributed by collective societies may account for only a small share of the revenues of its affiliates, and that societies retain a substantial share of the collected royalties to cover administrative costs and distribute another significant portion to the foreign entities they partner with.<sup>178</sup> Mr. Katz also asserted that a collective society will

**Several witnesses highlighted that ... educational institutions spend increasing amounts on the lawful acquisition of learning materials.**

175 INDU (2018), *Evidence*, 1625 (Dubois & Aubry, UNEQ); INDU (2018), *Evidence*, 1410, 1425 (Bulger, Nimbus Publishing); INDU (2018), *Evidence*, 1925 (MacLean); INDU (2018), *Evidence*, 1410 (Setzer, IPA); INDU (2018), *Evidence*, 1600 (Caron, OBPO); INDU (2018), *Evidence*, 1920 (Dema); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1920 (Barbara Spurr, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 1410, 1520 (Analee Greenberg & Michelle Peters, AMBP); INDU (2018), *Evidence*, 1400, 1450 (Robertson); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1910 (Michel Grandmaison, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1710 (Kevin Williams, ABPBC); INDU (2018), *Evidence*, 1540 (Sokoloski, PGC); Bernice Friesen, *Brief Submitted to INDU*, 16 April 2018; ABPBC, *Brief Submitted to INDU*, 22 May 2018; Guy Vanderhaeghe, *Brief Submitted to INDU*, 22 May 2018; AMBP, *Brief Submitted to INDU*, 3 August 2018; Fernwood Publishing, *Brief Submitted to INDU*, 3 August 2018; Brush Education, *Brief Submitted to INDU*, 5 September 2018.

176 See for example ACP, *Brief Submitted to INDU*, 3 August 2018.

177 INDU (2018), *Evidence*, 1530, 1600, 1640, 1710 (Rollans & Edwards, ACP); INDU (2018), *Evidence*, 1410, 1415, 1510 (Bulger, Nimbus Publishing); INDU (2018), *Evidence*, 1605 (Prieur, ANEL); INDU (2018), *Evidence*, 1405, 1445 (Hebb & Harnum, CCI); INDU (2018), *Evidence*, 1600 (Caron, OBPO); INDU (2018), *Evidence*, 1920 (Dema); INDU (2018), *Evidence*, 1410 (Greenberg & Peters, AMBP); INDU (2018), *Evidence*, 1500, 1510, 1530 (Robertson); INDU (2018), *Evidence*, 1410 (Setzer, IPA); INDU (2018), *Evidence*, 1545 (Sokoloski, PGC); ABPBC, *Brief Submitted to INDU*, 22 May 2018; Vanderhaeghe, *Brief Submitted to INDU*, 22 May 2018; ACP, *Brief Submitted to INDU*, 3 August 2018; AMBP, *Brief Submitted to INDU*, 3 August 2018; Fernwood Publishing, *Brief Submitted to INDU*, 3 August 2018; Brush Education, *Brief Submitted to INDU*, 5 September 2018. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1600 (Benoit Prieur, Association des distributeurs exclusifs de livres de langue française); IPA, *Brief Submitted to INDU*, 9 May 2018; Copibec, *Brief Submitted to INDU*, 31 May 2018; IFRRO, *Brief Submitted to INDU*, 14 December 2018.

178 INDU (2018), *Evidence*, 1905 (Elves); MacEwan University, *Brief Submitted to INDU*, 13 September 2018. See also INDU (2018), *Evidence*, 1915 (MacLaren).

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not adequately compensate rights-holders if it collects royalties for the use of works that do not appear in its repertoire without distributing them to their owners.<sup>179</sup>

Instead of encouraging or forcing a return to collective licensing, several witnesses suggested that the federal and provincial governments increase public funding available to publishers and creators.<sup>180</sup> Many among them proposed extending or drawing inspiration from the Public Lending Right Program to compensate Canadian creators and publishers for the use of their works in Canadian educational institutions, whether or not such use falls under fair dealing.<sup>181</sup> While some of the evidence suggests that rights-holders would better tolerate educational fair dealing if they received appropriate compensation for it,<sup>182</sup> the Association of Canadian Publishers (ACP) responded that, in this case, compensation would not reflect the market value of copyrighted content, would reduce the capacity of the industry to adapt to technological changes, and would further prevent rights-holders from fully engaging in the economy.<sup>183</sup> The Union des écrivaines et des écrivains du Québec (UNEQ) also observed that, currently, only a minority of writers benefit from direct grants.<sup>184</sup>

179 INDU (2018), *Evidence*, 1540-1545 (Katz).

180 See for example INDU (2018), *Evidence*, 1615 (Kiddell, CFS); INDU (2018), *Evidence*, 1540 (Swartz & Haigh, CARL); INDU (2018), *Evidence*, 1640 (McColgan & Owen, CFLA); INDU (2018), *Evidence*, 1555 (Lecorps, UEQ); INDU (2018), *Evidence*, 1900 (Selman); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1915 (Ryan Regier, as an individual); INDU (2018), *Evidence*, 1545, 1600 (Noel & Churchill, CMEC); BCLA, *Brief Submitted to INDU*, 20 November 2018; Fédération québécoise des professeures et professeurs d'université, *Brief Submitted to INDU*, 14 December 2018; Morrison, *Brief Submitted to INDU*, 14 December 2018; ECUAD, *Brief Submitted to INDU*, 14 December 2018; University of Manitoba, *Brief Submitted to INDU*, 14 December 2018. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 10 May 2018, 1915 (Ryan Regier, as an individual); Ryan Kelln, *Brief Submitted to INDU*, 25 May 2018.

181 INDU (2018), *Evidence*, 1705 (Foster & Jones, CAUT); INDU (2018), *Evidence*, 1540 (Swartz & Haigh, CARL); INDU (2018), *Evidence*, 1645 (Knopf); Nair, *Brief Submitted to INDU*, 31 May 2018; Universities Canada, *Brief Submitted to INDU*, 4 July 2018; MacEwan University, *Brief Submitted to INDU*, 13 September 2018; QLA, *Brief Submitted to INDU*, 13 September 2018; University of Lethbridge, *Brief Submitted to INDU*, 28 September 2018. But see Public Lending Right International, *Brief Submitted to INDU*, 14 December 2018.

182 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 28 November 2018, 1605, 1610 (Marcel Boyer, as an individual); INDU (2018), *Evidence*, 1535 (Azzaria); Coalition for Culture and Media [CCM], *Brief Submitted to INDU*, 7 May 2018; ANEL, *Brief Submitted to INDU*, 18 May 2018.

183 INDU (2018), *Evidence*, 1655 (Rollans & Edwards, ACP). See also INDU (2018), *Evidence*, 1710 (Williams, ABPBC); Brush Education, *Brief Submitted to INDU*, 5 September 2018. But see INDU (2018), *Evidence*, 1430 (Bulger, Nimbus Publishing).

184 INDU (2018), *Evidence*, 1625 (Dubois & Aubry, UNEQ). But see INDU (2018), *Evidence*, 1915 (MacLaren).



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## Committee Observations and Recommendations

The conflicting views presented on the matter of fair dealing are not entirely incompatible. The Canadian publishing sector is struggling to adjust to market disruptions that predate and are unrelated to amendments contained in the CMA. These disruptions will persist even if Parliament removed every single exception added to the Act in 2012. **The decline of collective licensing in education has arguably more to do with technological change than it does with fair dealing.** However, the CMA amendments expanded the breadth and number of exceptions to copyright liability available to educational administrators, educators, researchers and students. As one would expect, these exceptions affected their behavior and reduced the revenues of rights-holders.<sup>185</sup> This is particularly true when an educational institution argues that its activities fall under fair dealing, only to face appropriate scepticism in a court.

The evidence presented does give the Committee pause. Given that the fair dealing exception is normally applied on a case-by-case basis and in consideration of a number of different factors, condoning the use of copyrighted content under fair dealing on the basis of a bright-line criterion is questionable, especially when that criterion is at least partly based on a precedent that has little to do with the use of copyrighted content in the context of education.<sup>186</sup> A “one-size-fits-all” approach, while alluring to some, hardly suits section 29 of the Act as currently written. **The fact that educational institutions spend increasing amounts to lawfully access and use some copyrighted content does not preclude infringement beyond the terms of licensing agreements.** The Committee also notes that compliance mechanisms and disciplinary measures in case of copyright infringement vary from one institution to another, making it difficult to determine whether the education sector has adopted adequate measures to prevent and discourage copyright infringement since 2012.<sup>187</sup>

The Committee cannot endorse the proposal to limit educational fair dealing to cases where access to a work is not “commercially available,” as defined under the Act. While licensing should be encouraged, this proposal risks reducing flexibility in the educational market by favouring blanket over transactional licensing. **While the Government can facilitate negotiations between the relevant parties, it is not the role of Parliament to**

185 See for example INDU (2018), *Evidence*, 1610 (Ludbrook, Ryerson University).

186 INDU (2018), *Evidence*, 1625 (Noel & Churchill, CMEC).

187 Compare INDU (2018), *Evidence*, 1405 (Campbell & Balcom, UNB); INDU (2018), *Evidence*, 1445 (Stewart & Bourne-Tyson, CAUL); INDU (2018), *Evidence*, 1450 (Martin & Graham, University of Guelph); INDU (2018), *Evidence*, 1505 (Rollins, WSD); INDU (2018), *Evidence*, 1450 (Bell & Parker, UBC); INDU (2018), *Evidence*, 1545, 1635 (Marshall, University of Calgary); Université Laval, *Brief Submitted to INDU*, 21 September 2018. See also INDU (2018), *Evidence*, 1625 (Noel & Churchill, CMEC).

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compel provincial institutions into a specific licensing relationship. Moreover, claiming that parties engage in copyright infringement under an erroneous conception of fair dealing is an argument in favour of copyright enforcement; it does not, on its own, undermine the rationale that led Parliament to add the purpose of education to section 29 of the Act in 2012.

Considering evolving licensing models, ongoing court proceedings, and upcoming negotiations, the Committee is wary to intervene in the conflict surrounding educational fair dealing by recommending amendments to the Act—for now. The Government could instead help parties resolve their differences. The Committee therefore recommends:

### **Recommendation 16**

**That the Government of Canada consider establishing facilitation between the educational sector and the copyright collectives to build consensus towards the future of educational fair dealing in Canada.**

### **Recommendation 17**

**That the House of Commons Standing Committee on Industry, Science and Technology resume its review of the implementation of educational fair dealing in the Canadian educational sector within three years, based on new and authoritative information as well as new legal developments.**

## INSTITUTIONAL EXCEPTIONS

A few witnesses commented on exceptions available to educational institutions along with libraries, archives, and museums (LAMs). The British Columbia Library Association, for example, proposed amending the Act to state that LAMs are not required to pay statutory damages should they infringe on a non-published orphan work, provided they have reasonable grounds to believe that their use of the work conformed to a fair dealing purpose. Doing so would decrease liability risks LAMs face when dealing with such works.<sup>188</sup>

Other witnesses proposed adjusting institutional exceptions to facilitate their implementation and help LAMs fulfil their institutional mission. For example, the Canadian Association of Law Libraries, among others, noted that the inter-library loan provisions of the Act—specifically its section 30.2(5.02)—exceed libraries' enforcement

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188 INDU (2018), *Evidence*, 1415 (Middlemadd & Taylor, BCLA).



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capabilities and should only require LAMs to take “reasonable” measures to ensure an interlibrary borrower complies with legislative requirements.<sup>189</sup>

UNEQ proposed repealing section 30.04 of the Act. This provision allows educational institutions to use copyrighted content available on the Internet for educational purposes, providing that they mention the source of the work. The exception cannot apply, however, when a TPM restricts access to the content or when “a clearly visible notice ... prohibiting that [use] is posted at the Internet site where the work or other subject-matter is posted or on the [content] itself.”<sup>190</sup> UNEQ argued that section 30.04 contradicts a fundamental copyright principle, namely that an original work should attract copyright protection upon fixation and without further formality.<sup>191</sup>

The University of Alberta, however, would see this exception reinforced. By allowing a rights-holder to easily circumvent the exception with a “clearly visible notice,” section 30.04 of the Act “seems inconsistent with a balanced approach to copyright to allow rights-holders to restrict educational use of material freely available on the [Internet].”<sup>192</sup> Other witnesses argued that section 30.04, along with other educational exceptions, facilitates the dissemination and use of copyrighted content to the benefit of educational institutions, faculty and students, and should therefore be maintained.<sup>193</sup>

## EXHAUSTIVE OR ILLUSTRATIVE FAIR DEALING

A few witnesses, some of whom were representing the perspective of creators, proposed amending section 29 of the Act to add purposes to the fair dealing exception.

189 INDU (2018), *Evidence*, 1430 (Nayyer, CALL); BCLA, *Brief Submitted to INDU*, 20 November 2018; BAnQ, *Brief Submitted to INDU*, 14 December 2018; CALL, *Brief Submitted to INDU*, 7 January 2019. See also Angelstad et al., *Brief Submitted to INDU*, 14 December 2018; James Lee, *Brief Submitted to INDU*, 14 December 2018. But see IPA, *Brief Submitted to INDU*, 9 May 2018.

190 *Copyright Act*, s. 30.04(4)(b).

191 UNEQ, *Brief Submitted to INDU*, 24 April 2018.

192 University of Alberta, *Brief Submitted to INDU*, 20 November 2018.

193 CAUL, *Brief Submitted to INDU*, 28 September 2018; Concordia University et al., *Brief Submitted to INDU*, 18 June 2018.



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Such purposes include quotation,<sup>194</sup> pastiche and caricature,<sup>195</sup> reconciliation,<sup>196</sup> transformation,<sup>197</sup> as well as non-expressive or non-consumptive uses.<sup>198</sup>

Rather than revisiting section 29 of the Act to add purposes to the fair dealing exceptions whenever the need arises, Mr. Geist—among others<sup>199</sup>—proposed making the purposes enumerated under the fair dealing provision illustrative (rather than exhaustive) by adding the words “such as” to that provision. An illustrative fair dealing provision would let the courts determine which purposes are admissible to fair dealing and would rely on existing Canadian jurisprudence to “maintain the full fairness analysis ... to minimize uncertainty.”<sup>200</sup> He argued that an illustrative fair dealing provision would simplify the Act, increase its flexibility, make it more technology neutral, and place Canadians on a level playing field with countries that have a similar provision, such as the US.<sup>201</sup>

Carys Craig, Associate Professor of Law at York University, agreed that adding the phrase “such as” to section 29 of the Act would make the Canadian fair dealing model more

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- 194 INDU (2018), *Evidence*, 1620 (Thompson & Hebb, ALAC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1900 (Devon Cooke, as an individual); INDU (2018), *Evidence*, 1535 (Azzaria).
- 195 INDU (2018), *Evidence*, 1620 (Thompson & Hebb, ALAC); ALAC, *Brief Submitted to INDU*, 14 December 2018.
- 196 NCTR, *Brief Submitted to INDU*, 14 December 2018; University of Manitoba, *Brief Submitted to INDU*, 14 December 2018.
- 197 INDU (2018), *Evidence*, 1715 (Craig); ACAD, *Brief Submitted to INDU*, 14 December 2018; OpenMedia, *Brief Submitted to INDU*, 14 December 2018.
- 198 INDU (2018), *Evidence*, 1640 (Merkley, CrCC). See also Kelln, *Brief Submitted to INDU*, 25 May 2018.
- 199 INDU (2018), *Evidence*, 1540 (Swartz & Haigh, CARL); INDU (2018), *Evidence*, 1720 (McColgan & Owen, CFLA); INDU (2018), *Evidence*, 1635 (Petricone, CTA); INDU (2018), *Evidence*, 1640 (Merkley, CrCC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 November 2018, 1550 (David Fewer, CIPPIC); INDU (2018), *Evidence*, 1620 (Knopf); INDU (2018), *Evidence*, 1640 (de Beer); INDU (2018), *Evidence*, 1700 (Hayes); INDU (2018), *Evidence*, 1625 (Katz); INDU, *Evidence*, 5 December 2018, 1715 (Pascale Chapdelaine, as an individual); INDU (2018), *Evidence*, 1730 (Tawfik); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 12 December 2018, 1545 (Meera Nair, as an individual); Creative Commons, *Brief Submitted to INDU*, 25 May 2018; Organization for Transformative Works [OTW], *Brief Submitted to INDU*, 13 June 2018; University of Guelph, *Brief Submitted to INDU*, 4 July 2018; Sara Bannerman, Pascale Chapdelaine, Olivier Charbonneau, Craig Carys, Lucie Guibault, Ariel Katz, Meera Nair, Graham Reynolds, Teresa Scassa, Myra Tawfik & Samuel E. Trosow [Chapdelaine et al.], *Brief Submitted to INDU*, 22 October 2018; Luke Maynard, Pierre-Luc Racine & John Sime, *Brief Submitted to INDU*, 7 December 2018; LAA, *Brief*, 10 December 2018; Angelstad et al., *Brief Submitted to INDU*, 14 December 2018; University of Waterloo, *Brief Submitted to INDU*, 14 December 2018; Western University, *Brief Submitted to INDU*, 14 December 2018; CAUT, *Brief Submitted to INDU*, 14 December 2018.
- 200 Geist, *Brief Submitted to INDU*, 14 December 2018.
- 201 INDU (2018), *Evidence*, 1545, 1605 (Geist); Geist, *Brief Submitted to INDU*, 14 December 2018.



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open, general, and flexible.<sup>202</sup> She also suggested adding the fairness factors set up by the SCC to increase the clarity of the exception.<sup>203</sup> She further proposed clarifying that fair dealing and other exceptions may be used to counter moral rights claims to protect some uses from the “chilling effects” of potential moral rights liability.<sup>204</sup>

Other witnesses opposed the proposal.

Mr. Sookman argued that adding the words “such as” would only increase uncertainty and litigation, two things Canadian fair dealing already struggles with.<sup>205</sup> He added

that adopting a fair use model in Canada would be a “huge setback” by strengthening the bargaining power of OSPs, against whom small rights-holders would not be able to enforce their rights.<sup>206</sup> According to

Mr. Chisick, a majority of countries—

including Canada—have adopted a fair

dealing model so that governments, rather

than the courts, can decide what purposes are eligible for a fair dealing exception. The

current fair dealing model is thus more predictable for stakeholders than a model in

which a limited list of uses could expand overnight to an entire realm of potential

dealings.<sup>207</sup> Ysolde Gendreau, Professor of Law at the Université de Montréal,

commented that the protection of copyright interests in Canada may not be as

aggressive as in the US and would therefore not require adopting a fair use model.<sup>208</sup>

**[A]n illustrative fair dealing provision would simplify the Act, increase its flexibility, make it more technology neutral, and place Canadians on a level playing field with countries that have a similar provision.**

202 INDU (2018), *Evidence*, 1655, 1720 (Craig).

203 Ibid., 1655, 1720 (Craig). See also INDU (2018), *Evidence*, 1410 (Greenberg & Peters, AMBP); INDU (2018), *Evidence*, 1600 (Guérin & Banza, RAAVQ); CAA, *Brief Submitted to INDU*, 14 December 2018. But see RAAVQ, *Brief Submitted to INDU*, 26 October 2018.

204 INDU (2018), *Evidence*, 1655 (Craig).

205 INDU (2018), *Evidence*, 1625 (Sookman). See also Giuseppina D’Agostino, *Brief Submitted to INDU*, 10 December 2018.

206 INDU (2018), *Evidence*, 1625 (Sookman); Barry Sookman, *Brief Submitted to INDU*, 10 December 2018.

207 INDU (2018), *Evidence*, 1610 (Chisick).

208 INDU (2018), *Evidence*, 1610 (Gendreau).

## Committee Observations and Recommendation

Parliament should make the list of purposes enumerated under section 29 of the Act an illustrative list rather than an exhaustive one. Doing so would increase the flexibility of the Act by allowing a broader range of admissible purposes to emerge from existing ones under the guidance and the supervision of the courts—for example, from criticism to quotation, from parody to pastiche, and from research to informational analysis. Such an amendment could allow new practices to fall under fair dealing, such as “reaction videos” and video game streaming. The Committee emphasizes that the purpose of a dealing is only one of many factors taken into account when determining whether this dealing is indeed fair under section 29 of the Act. The Committee therefore recommends:

### Recommendation 18

**That the Government of Canada introduce legislation amending section 29 of the Copyright Act to make the list of purposes allowable under the fair dealing exception an illustrative list rather than an exhaustive one.**

## TECHNOLOGICAL PROTECTION MEASURES AND CONTRACT OVERRIDES

Several witnesses proposed allowing the circumvention of TPMs for non-infringing purposes. The Canadian Internet Policy and Public Interest Clinic (CIPPIC) best summarized arguments in favour of this proposal as follows:

Currently, restrictions on digital lock circumvention are nearly all-encompassing, thereby preventing even legitimate copying activities. Archivists and librarians cannot preserve locked content without breaking the law; filmmakers, news reporters, and other innovative creators cannot legally access the content they need. These restrictions undermine Canadian innovation and the public domain. Furthermore, those who would infringe can easily access and use circumvention software through the Internet—almost all digital lock mechanisms are eventually broken. The locks thus do not stop those determined to break the law. Instead, they merely frustrate legitimate consumers and creators.<sup>209</sup>

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209 CIPPIC, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1650 (Foster & Jones, CAUT); INDU (2018), *Evidence*, 1535 (McDonald, CASA); INDU (2018), *Evidence*, 1540 (Swartz & Haigh, CARL); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 April 2018, 1630 (Carol Shepstone, CRKN); INDU (2018), *Evidence*, 1535 (McColgan & Owen, CFLA); INDU (2018), *Evidence*, 1415 (Workman, ANSUT); INDU (2018), *Evidence*, 1600 (Westwood, DFA); INDU (2018), *Evidence*, 1615 (Muller, Colleges Ontario); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1420 (Susan Caron, Toronto Public Library); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1915 (Jess Whyte, as an individual); INDU (2018),



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Evoking a “right to repair,” the Consumer Technology Association (CTA) added that the Act should not prevent anyone from circumventing a TPM in order to lawfully conduct the “diagnosis, maintenance and repair of modern cars, farm equipment and other devices, because embedded software has replaced analog circuitry in mechanical parts.”<sup>210</sup>

Some witnesses objected to easing anti-circumvention rules, highlighting the important role TPMs play in the protection of copyright. The Canadian Publishers Council explained that publishers rely on TPMs to ensure payment for the use of digital content, such as e-books, and to ensure that the online distribution of copyrighted materials remains a sustainable business model for publishers.<sup>211</sup> Similarly, the

**[T]he Consumer Technology Association added that the Act should not prevent anyone from circumventing a TPM in order to lawfully conduct the “diagnosis, maintenance and repair of modern cars, farm equipment and other devices.”**

*Evidence*, 1410 (Middlemadd & Taylor, BCLA); INDU (2018), *Evidence*, 1555, 1610, 1625 (Marrelli, CCA); INDU (2018), *Evidence*, 1545, 1620, 1625, 1650 (Fewer, CIPPIC); INDU (2018), *Evidence*, 1620 (Knopf); INDU (2018), *Evidence*, 1715 (Chapdelaine); INDU (2018), *Evidence*, 1545 (Geist); INDU (2018), *Evidence*, 1700 (Craig); INDU (2018), *Evidence*, 1650 (Nair); Nair, *Brief Submitted to INDU*, 31 May 2018; DFA, *Brief Submitted to INDU*, 13 June 2018; OTW, *Brief Submitted to INDU*, 13 June 2018; Public Interest Advocacy Centre [PIAC], *Brief Submitted to INDU*, 13 June 2018; MRU, *Brief Submitted to INDU*, 18 June 2018; CASA, *Brief Submitted to INDU*, 4 July 2018; University of Guelph, *Brief Submitted to INDU*, 4 July 2018; CIC, *Brief Submitted to INDU*, 3 August 2018; Ontario Council of University Libraries’ Digital Curation Community, *Brief Submitted to INDU*, 5 September 2018; University of Calgary, *Brief Submitted to INDU*, 5 September 2018; Education International, *Brief Submitted to INDU*, 13 September 2018; MacEwan University, *Brief Submitted to INDU*, 13 September 2018; CARL, *Brief Submitted to INDU*, 28 September 2018; CAUL, *Brief Submitted to INDU*, 28 September 2018; University of Lethbridge, *Brief Submitted to INDU*, 28 September 2018; IFLAI, *Brief Submitted to INDU*, 12 October 2018; University of Alberta, *Brief Submitted to INDU*, 20 November 2018; UNB, *Brief Submitted to INDU*, 4 December 2018; Angelstad et al., *Brief Submitted to INDU*, 14 December 2018; AQED, *Brief Submitted to INDU*, 14 December 2018; CAUT, *Brief Submitted to INDU*, 14 December 2018; CSC, *Brief Submitted to INDU*, 14 December 2018; Cory Doctorow, *Brief Submitted to INDU*, 14 December 2018; Langara College, *Brief Submitted to INDU*, 14 December 2018; James Lee, *Brief Submitted to INDU*, 14 December 2018; NorQuest College, *Brief Submitted to INDU*, 14 December 2018; OpenMedia, *Brief Submitted to INDU*, 14 December 2018; Ryerson University, *Brief Submitted to INDU*, 14 December 2018; University of Manitoba, *Brief Submitted to INDU*, 14 December 2018; Western University, *Brief Submitted to INDU*, 14 December 2018; Tawfik et al., *Brief Submitted to INDU*, 18 January 2019. Compare with Matthew Harvey, *Brief Submitted to INDU*, 26 October 2018; Albert Ng, *Brief Submitted to INDU*, 4 December 2018.

210 INDU (2018), *Evidence*, 1635 (Petricone, CTA). See also INDU (2018), *Evidence*, 1710, 1725 (Geist); CTA, *Brief Submitted to INDU*, 11 September 2018.

211 INDU (2018), *Evidence*, 1710 (Swail, CPC). See also INDU (2018), *Evidence*, 1610 (Rollans & Edwards, ACP); INDU (2018), *Evidence*, 1610 (Degen, WUC).

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Entertainment Software Association insisted that the video-game industry relies on TPMs to protect their financial investments and to enable business models based on selling console exclusives. Loosening anti-circumvention rules also raised concerns about the unauthorized modification of video games.<sup>212</sup> Other witnesses representing the interests of rights-holders stated that TPMs are not effective at protecting copyrighted content and, therefore, they do not heavily depend on them.<sup>213</sup>

Multiple witnesses also proposed introducing a provision to the Act that would prevent the enforcement of a contractual clause in relation to activities that would not constitute infringement under the Act.<sup>214</sup> Such an exception would counteract terms of uses that prevent licensees from taking advantage of statutory exceptions, including fair dealing:

For example, under a current licensing agreement, primary and secondary school teachers can combine excerpts and images from various publications only for exams or for digital presentations and slideshows. As such, creating course packs or exercise books bringing together selections from a variety of sources is not permitted, which severely hampers educators' ability to adapt lesson plans to their students' needs.<sup>215</sup>

Given that such restrictive licences are more prevalent in the digital environment, where content is typically accessed under a licence, and coupled with TPMs and anti-

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- 212 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 3 October 2018, 1710, 1720, 1725 (Jayson Hilchie, Entertainment Software Association of Canada).
- 213 INDU (2018), *Evidence*, 1500 (Thompson & Hebb, ALAC); INDU (2018), *Evidence*, 1500 (Hebb & Harnum, CCI); INDU (2018), *Evidence*, 1630 (Dubois & Aubry, UNEQ).
- 214 INDU (2018), *Evidence*, 1535 (McColgan & Owen, CFLA); INDU (2018), *Evidence*, 1400 (Stewart & Bourne-Tyson, CAUL); INDU (2018), *Evidence*, 1620 (Muller, Colleges Ontario); INDU (2018), *Evidence*, 1410 (Middlemadd & Taylor, BCLA); INDU (2018), *Evidence*, 1425 (Nayyer, CALL); INDU (2018), *Evidence*, 1910 (de Castell); INDU (2018), *Evidence*, 1550 (Fewer, CIPPIC); INDU (2018), *Evidence*, 1620 (Knopf); INDU (2018), *Evidence*, 1725 (Chapdelaine); INDU (2018), *Evidence*, 1700 (Craig); MRU, *Brief Submitted to INDU*, 18 June 2018; CIC, *Brief Submitted to INDU*, 3 August 2018; Federation of Canadian Municipalities [FCM], *Brief Submitted to INDU*, 3 August, 2018; Education International, *Brief Submitted to INDU*, 13 September 2018; MacEwan University, *Brief Submitted to INDU*, 13 September 2018; CAUL, *Brief Submitted to INDU*, 28 September 2018; University of Lethbridge, *Brief Submitted to INDU*, 28 September 2018; IFLAI, *Brief Submitted to INDU*, 12 October 2018; CULC, *Brief Submitted to INDU*, 12 October 2018; Chapdelaine et al., *Brief Submitted to INDU*, 22 October 2018; Simon Fraser University [SFU], *Brief Submitted to INDU*, 15 October 2018; UNB, *Brief Submitted to INDU*, 4 December 2018; ACAD, *Brief Submitted to INDU*, 14 December 2018; AQED, *Brief Submitted to INDU*, 14 December 2018; BAnQ, *Brief Submitted to INDU*, 14 December 2018; ECUAD, *Brief Submitted to INDU*, 14 December 2018; University of Manitoba, *Brief Submitted to INDU*, 14 December 2018; Western University, *Brief Submitted to INDU*, 14 December 2018; CALL, *Brief Submitted to INDU*, 7 January 2019; CCP, *Brief Submitted to INDU*, 7 January 2019; Knopf, *Brief Submitted to INDU*, 7 January 2019.
- 215 QLA, *Brief Submitted to INDU*, 13 September 2018.



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circumvention rules, restrictive licensing is said to increase the discrepancy between the ways in which the Act applies to physical and digital environments.<sup>216</sup>

## Committee Observations and Recommendations

The Committee recognizes that the effective use of TPMs remains important in at least some creative industries and that Canada has international obligations in the matter. However, it agrees that the circumvention of TPMs should be allowed for non-infringing purposes, especially given the fact that the *Nintendo* case provided such a broad interpretation of TPMs. In other words, while anti-circumvention rules should support the use of TPMs to enable the remuneration of rights-holders and prevent copyright infringement, they should generally not prevent someone from committing an act otherwise authorized under the Act. The Committee therefore recommends:

### Recommendation 19

**That the Government of Canada examine measures to modernize copyright policy with digital technologies affecting Canadians and Canadian institutions, including the relevance of technological protection measures within copyright law, notably to facilitate the maintenance, repair or adaptation of a lawfully-acquired device for non-infringing purposes.**

## USER-GENERATED CONTENT

Many witnesses expressed dissatisfaction with the exception for new non-commercial user-generated content.<sup>217</sup> UNEQ argued that the exception conflicts with the moral rights of authors by allowing the unauthorized modification of protected works and Parliament should thus repeal it.<sup>218</sup> ALAC proposed instead to limit the scope of section 29.21 of the Act by providing rights-holders with the right to authorize user-generated content “for either non-commercial or commercial purposes, and if the latter, to receive

216 INDU (2018), *Evidence*, 1535 (McColgan & Owen, CFLA); INDU (2018), *Evidence*, 1410 (Middlemadd & Taylor, BCLA); University of Guelph, *Brief Submitted to INDU*, 4 July 2018; FCM, *Brief Submitted to INDU*, 3 August, 2018; University of Calgary, *Brief Submitted to INDU*, 5 September 2018; CARL, *Brief Submitted to INDU*, 28 September 2018; Ryerson University, *Brief Submitted to INDU*, 14 December 2018; University of Waterloo, *Brief Submitted to INDU*, 14 December 2018. See also Kelln, *Brief Submitted to INDU*, 25 May 2018.

217 INDU (2018), *Evidence*, 1645 (Hebb & Harnum, CCI).

218 INDU (2018), *Evidence*, 1635 (Dubois & Aubry, UNEQ); UNEQ, *Brief Submitted to INDU*, 24 April 2018.

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payment,” and to entrust the management of such rights to collective societies.<sup>219</sup> Some witnesses noted that OSPs profit from user-generated content uploaded on their platforms even as if creators of the user-generated content do not, thereby unduly exploiting an exception to appropriate revenues that should go to rights-holders.<sup>220</sup>

Other witnesses defended the exception. They celebrated section 29.21 of the Act for allowing Canadian creators to hone socially valuable skills by combining and recombining existing works to create and share new ones without having to pay rights-holders or seek their authorization. Limiting the scope of section 29.21 or repealing the provision would thus hinder activities they consider beneficial to Canadian society as a whole.<sup>221</sup> CTA warned against discouraging OSPs from hosting non-commercial user-generated content on their platforms.<sup>222</sup> Proponents of the exception suggested clarifying whether it applies even when the user-generated content is uploaded on a platform that has the capability for monetization, or when the content, while initially used for non-commercial purposes, “goes viral” upon reception and only then generates revenues.<sup>223</sup>

### Committee Observations and Recommendation

The Committee finds it improper that an OSP would shield its commercial exploitation of a work behind section 29.21(1) of the Act. After all, this provision only applies to individuals. Moreover, an individual protected by the exception should not be liable for any unintended copyright infringement of a work or other subject-matter used to generate the new content. The Committee therefore recommends:

219 INDU (2018), *Evidence*, 1620 (Thompson & Hebb, ALAC).

220 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1735 (Patrick Curley, Third Side Music Inc. [TSM]); INDU (2018), *Evidence*, 1635 (Payette, PMPA); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 1 October 2018, 1550 (Marie-Josée Dupré, Société professionnelle des auteurs et des compositeurs du Québec [SPACQ]); ALAC, *Brief Submitted to INDU*, 14 December 2018.

221 INDU (2018), *Evidence*, 1635 (Swartz & Haigh, CARL); INDU (2018), *Evidence*, 1635, 1620 (McDonald, CASA); INDU (2018), *Evidence*, 1410 (Middlemadd & Taylor, BCLA); INDU (2018), *Evidence*, 1650 (Nair); OTW, *Brief Submitted to INDU*, 13 June 2018; Concordia University et al., *Brief Submitted to INDU*, 18 June 2018; CULC, *Brief Submitted to INDU*, 12 October 2018; BCLA, *Brief Submitted to INDU*, 20 November 2018; Angelstad et al., *Brief Submitted to INDU*, 14 December 2018; BAnQ, *Brief Submitted to INDU*, 14 December 2018. See also Kelln, *Brief Submitted to INDU*, 25 May 2018; OpenMedia, *Brief Submitted to INDU*, 14 December 2018.

222 INDU (2018), *Evidence*, 1635 (Petricone, CTA); CTA, *Brief Submitted to INDU*, 11 September 2018.

223 OTW, *Brief Submitted to INDU*, 13 June 2018; Angelstad et al., *Brief Submitted to INDU*, 14 December 2018.



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## Recommendation 20

**That the Government of Canada review section 29.21 of the *Copyright Act* to ensure that the creator of non-commercial user-generated content is not held liable for unintended copyright infringement.**

## TECHNOLOGICAL EXCEPTIONS

### Safe Harbour Provisions

Several witnesses proposed that sections 31.1 and 41.27 of the Act be reviewed. In general terms, these “safe-harbour provisions” limit the liability of ISPs and OSPs for acts of copyright infringement committed through their services. Proponents of reviewing these provisions argued that they had the unintended consequence of allowing “a massive reallocation of economic value from copyright owners to ad-supported online platforms that purport to qualify for the hosting exception while effectively functioning as ... streaming services.”<sup>224</sup> As explained by Mr. Henderson, the music industry receives far more revenues from subscription-based streaming services than from ad-supported ones:

For the first time, streaming has surpassed physical, surpassed downloads, surpassed everything. It's the dominant method that people use. There are two specific models. One is the paid subscription model—that's Spotify or Deezer—and then you have the ad-supported services, which feature mostly user uploaded content—that's YouTube.

If you look at the digital breakdown, the revenue return from paid subscriptions as a percentage of the digital pie is almost 60%, and the revenue return from YouTube is under 6%. So fewer subscribers to Spotify—because they're paid subscribers and because we negotiated a deal with them—return an enormous amount of money despite the fact there are more YouTube users. It's just so little that comes back.<sup>225</sup>

Restricting safe harbour provisions would arguably force OSPs operating user-upload, ad-supported services such as YouTube to implement stronger measures to prevent unauthorized use of copyrighted content on their platforms and to compensate rights-holders at the level of subscription-based streaming services such as Spotify.<sup>226</sup> Again, according to Mr. Henderson:

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224 CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018.

225 INDU (2018), *Evidence*, 1650 (Henderson, Music Canada).

226 INDU (2018), *Evidence*, 1605, 1630 (Long, MNS); INDU (2018), *Evidence*, 1550, 1650 (McGuffin, CMuPA); INDU (2018), *Evidence*, 1545, 1625, 1645 (Henderson, Music Canada); INDU (2018), *Evidence*, 1620, 1715



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[P]olicy-makers around the world—governments—decided to give the technology companies an advantage in the negotiations. It's very difficult to negotiate with somebody when they can stand behind a safe harbour. It's very difficult to negotiate and get.... We can't get market rates. The reason YouTube returns so little value as compared to Spotify is that in the case of Spotify, we were able to negotiate with them. There were no safe harbours. In the case of YouTube, hiding behind a safe harbour, the per-stream return is one-twentieth.

Part of what we're asking is for governments around the world to level this playing field, to remove all of these advantages that were afforded to these gigantic technological enterprises or broadcasting enterprises, and to return some semblance of balance to the market.<sup>227</sup>

The PMPA observed that ISPs and OSPs offer a variety of services that greatly differ in the ways in which they interact with copyrighted content, and that Parliament should adjust the Act accordingly: the “development of the Internet may have been difficult to predict, but today we know that not all those companies provide the same services. The *Copyright Act* must now consider those companies' spectrum of activities and ensure that their responsibilities are not automatically the same.”<sup>228</sup> To many witnesses, Article 17 of the Directive promises to be an effective way to handle OSPs in the context of copyright law.<sup>229</sup>

Witnesses proposed different ways to readjust safe-harbour provisions to the benefit of rights-holders. For example, Music Canada proposed that the hosting services exception should only be available to technical, automated and passive intermediaries with no knowledge of alleged infringements.<sup>230</sup> More specifically, the Canadian Musical Reproduction Rights Agency (CMRRA) and the Canadian Music Publishers Association (CMuPA) proposed to amend section 31.1(4) of the Act to clarify that the exception is not available to a “content provider,” i.e., a service playing “any active role in the

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(Noss, MPAC); INDU (2018), *Evidence*, 1620 (Plante & Hénault, SARTEC); INDU (2018), *Evidence*, 1705, 1710 (Payette, PMPA); INDU (2018), *Evidence*, 1535 (Chisick); INDU (2018), *Evidence*, 1640, 1715 (Gendreau); CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018; MPAC, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1710 (Tarantino & Lovrics, IPIC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1935 (Julie Barlow, as an individual); CMePA, *Brief Submitted to INDU*, 14 December 2018.

227 INDU (2018), *Evidence*, 1625 (Henderson, Music Canada).

228 INDU (2018), *Evidence*, 1530 (Payette, PMPA).

229 See for example INDU (2018), *Evidence*, 1620 (Noss, MPAC); Ibid., 1530, 1700 (Payette, PMPA); Music Canada, *Brief Submitted to INDU*, 14 December 2018; SCGC, *Brief Submitted to INDU*, 20 November 2018. But see INDU (2018), *Evidence*, 1715 (Rathwell & Kerr-Wilson, Shaw).

230 CMePA, *Brief Submitted to INDU*, 14 December 2018; Music Canada, *Brief Submitted to INDU*, 14 December 2018; OMM, *Brief Submitted to INDU*, 14 December 2018.



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communication to the public of” copyrighted content.<sup>231</sup> The exception would thus not apply to a service that “promotes or optimizes the presentation of” copyrighted content, notably by “categorizing works, ... creating recommended playlists, [or] providing an ‘auto-complete’ search function.”<sup>232</sup> The FNC also proposed to amend section 41.27(5) of the Act to exclude from the definition of “information location tool” any such tool that endorses or encourages access to copyrighted material.<sup>233</sup> The *Guilde des musiciens et musiciennes du Québec* suggested repealing section 31.1 altogether.<sup>234</sup>

Some witnesses argued that the safe-harbour provisions available to online service providers should be conditional on the implementation of effective anti-infringement policies. The Canadian Media Producers Association, for example, argued that an OSP should not benefit from a safe harbour when it has “knowledge that their systems are being used for infringing purposes, but take no steps to stop it.”<sup>235</sup> One proposed method for the imposition of this condition is to require that online service providers adopt “content filters.” Such mechanisms would monitor content as it is introduced by users onto an online platform, compared to copyrighted content and, if found to be an unauthorized copy, blocked.<sup>236</sup> Wendy Noss from the Motion Picture Association-Canada added that it would encourage “all intermediaries in the system to act responsibly” and assist in the fight against online piracy, particularly where a commercial infringer might rely on multiple intermediaries at once.<sup>237</sup>

Proposals to narrow safe-harbour provisions drew much opposition from other witnesses—including Google Canada, a subsidiary of Google, which operates YouTube:

Indeed, such protections are central to the very operation of the open Internet. If online services are liable for the activities of their users, then open platforms simply cannot function. The risk of liability would severely restrict their ability to allow user content onto their systems.

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- 231 CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1655 (Rioux, CMRRA).
  - 232 CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1615 (Chisick).
  - 233 FNC, *Brief Submitted to INDU*, 18 May 2018.
  - 234 INDU (2018), *Evidence*, 1545 (Lefebvre, GMMQ).
  - 235 CMePA, *Brief Submitted to INDU*, 14 December 2018.
  - 236 INDU (2018), *Evidence*, 1655 (Willaert, CFM).
  - 237 INDU (2018), *Evidence*, 1715, 1755 (Noss, MPAC).

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This would have profound effects on open communication online, severely impacting the emerging class of digital creators who rely on these platforms for their livelihood and curtailing the broad economic benefits that intermediaries generate.<sup>238</sup>

Google Canada defended itself against accusations of rampant copyright infringement from the music industry, noting that most of the content on Google's platforms is already licensed, as it is the case with Spotify.<sup>239</sup> Indeed, according to Mr. Henderson, "98% of everything that's on YouTube is licensed."<sup>240</sup> Google Canada argued that YouTube's copyright-management system already monitors the unauthorized upload of copyrighted content and allows a rights-holder to choose whether to take it down or, as the majority of rights-holders do, to monetize it, making further measures unnecessary.<sup>241</sup> Shaw also argued in favour of maintaining safe-harbour provisions, arguing that obligations of ISPs under the notice-and-notice regime must be considered when assessing the network services exception, and noting that "the hosting exception is not available with respect to materials that the host knows infringe copyright."<sup>242</sup>

**YouTube's content-management system does not apply the Canadian fair dealing exception.**

Opposition to upload filtering focused on its market effects and its efficacy. OpenMedia, for example, argued that the implementation of content filtering would be expensive to implement and might have serious anti-competitive effects by raising the entry costs for new participants in the platform market.<sup>243</sup> Witnesses also argued that it would likely result in the filtering out of non-infringing content, and thus limit creativity and

238 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 November 2018, 1550-1555 (Jason Kee, Google Canada). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2018, 1535 (Mark Graham & Robert Malcolmson, BCE Inc. [BCE]); Internet Association, *Brief Submitted to INDU*, 20 November 2018; BCE, *Brief Submitted to INDU*, 14 December 2018.

239 INDU (2018), *Evidence*, 1615 (Kee, Google Canada); Google Canada, *Brief Submitted to INDU*, 7 January 2019. See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 November 2018, 1550 (Darren Schmidt, Spotify).

240 INDU (2018), *Evidence*, 1615 (Henderson, Music Canada).

241 INDU (2018), *Evidence*, 1615 (Kee, Google Canada); Google Canada, *Brief Submitted to INDU*, 7 January 2019. See also INDU (2018), *Evidence*, 1630 (Long, MNS).

242 INDU (2018), *Evidence*, 1545 (Rathwell & Kerr-Wilson, Shaw). See also Internet Association, *Brief Submitted to INDU*, 20 November 2018.

243 INDU (2018), *Evidence*, 1650 (Tribe & Aspiaz, OpenMedia). See also INDU (2018), *Evidence*, 1635 (Petricone, CTA); INDU (2018), *Evidence*, 1705 (Kee, Google Canada); INDU (2018), *Evidence*, 1630 (de Beer); CTA, *Brief Submitted to INDU*, 11 September 2018; Doctorow, *Brief Submitted to INDU*, 14 December 2018.



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opportunities to share such content.<sup>244</sup> Content filters may miss infringing content as well, with John Fewer, Director of CIPPIC, describing them as “both over-inclusive and under-inclusive.”<sup>245</sup> Other witnesses added that even if content filters succeeded in reducing unauthorized content on online platforms—which is unlikely—they would still fail to increase the remuneration of rights-holders.<sup>246</sup>

Jason Kee, Public Policy and Government Relations Counsel at Google Canada, also indicated that YouTube’s content-management system does not apply the Canadian fair dealing exception, and that much of how the platform handles copyright infringements is left to the discretion of rights-holders:

**Mr. David de Burgh Graham:**

Do these systems currently handle Canadian fair dealing exceptions in their enforcement?

**Mr. Jason Kee:**

Essentially, no, effectively because fair dealing is a contextual test that requires analysis on each individual case. On any automated system, no matter how good the algorithm, no matter how sophisticated the machine learning that we’re applying—and we are doing that—basically, we’ll never be able to ascertain that. This is why it’s critically important that it has an appeal system: it’s so if a video that is a clear case of fair dealing is allowed and then gets caught by the system, they can appeal that decision. It will basically be determined and released.

**Mr. David de Burgh Graham:**

Then in both of your situations, why isn’t the system set up to say, “You have a flag; please respond within 24 hours, and then we’ll take it down”, to make it a system where one is innocent until proven guilty instead of guilty until proven innocent?

**Mr. Jason Kee:**

In some instances, that does happen. It depends on what policy the rights holder has chosen to enact and how they’ve selected to do so.<sup>247</sup>

244 INDU (2018), *Evidence*, 1650 (Tribe & Aspiazu, OpenMedia). See also INDU (2018), *Evidence*, 1645 (Chan, Facebook); INDU (2018), *Evidence*, 1645 (Kee, Google Canada); INDU (2018), *Evidence*, 1630 (de Beer); Nami Cho, *Brief Submitted to INDU*, 14 December 2018.

245 INDU (2018), *Evidence*, 1610 (Fewer, CIPPIC).

246 INDU (2018), *Evidence*, 1715 (Rathwell & Kerr-Wilson, Shaw); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 1715 (Andy Kaplan-Myrth, TekSavvy Solutions Inc. [TekSavvy]); Doctorow, *Brief Submitted to INDU*, 14 December 2018.

247 INDU (2018), *Evidence*, 1625-1630 (Kee, Google Canada). See also INDU (2018), *Evidence*, 1630 (Chan, Facebook); INDU (2018), *Evidence*, 1630-1635, 1705 (Kee, Google Canada).

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More generally, the CTA urged the Committee to show caution when regulating technology:

The general trend is that new technologies open up new distribution platforms, allow access to new consumer groups, and allow new ways to monetize, as you're seeing now on the Internet with the growth of streaming music.

Our advice is always to be very light-handed on the regulation of new technologies because you're not sure what kinds of opportunities in terms of creative opportunities or economic opportunities you may be inadvertently foreclosing.<sup>248</sup>

Yet another strand of evidence suggested that the challenges the music industry and its creators currently face are much more complex and multi-faceted than what the value-gap theory suggests. Indeed, its proponents heavily criticized user-upload, ad-supported platforms such as YouTube, and argued that restricting safe-harbour provisions would increase the revenues of rights-holders by forcing them to licence the copyrighted content they distribute, as it is the case with Spotify.<sup>249</sup> However, some witnesses, including creators, expressed strong dissatisfaction with the revenues they receive from any streaming service, not only YouTube, as related by author-composer-performer Pierre Lapointe:

Spotify has just gone public. Do you have any idea of the value of a Spotify logo? Have you tried to quantify the value of Canadian content that has not been paid to Canadian creators to increase the value of the Spotify logo? Think about iTunes and YouTube. They're laughing at us. That's money that's leaving Canada and that won't come back to the pockets of Canada.

I just want to tell you one thing: move fast, because I'm still able to live well with copyrights, but with a million streams on Spotify, I earned \$500. That's \$500 for a million streams. If I'm receiving \$500 for a million streams, I'm not mentioning others who are not as well known as me.<sup>250</sup>

**[A]nother strand of evidence suggested that the challenges the music industry and its creators currently face are much more complex and multi-faceted than what the value-gap theory suggests.**

248 INDU (2018), *Evidence*, 1700 (Petricone, CTA). See also INDU (2018), *Evidence*, 1710 (Rathwell & Kerr-Wilson, Shaw).

249 See for example INDU (2018), *Evidence*, 1625 (Henderson, Music Canada).

250 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1925 (Pierre Lapointe, as an individual). See also INDU (2018), *Evidence*, 1905 (Brunet); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1920 (Luc



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Author-composer-performer David Bussi res testified that he received more revenues from YouTube than he did from Spotify:

I do thorough research with my royalty statements for a song to find out that, after generating 30,000 streams on Spotify, we received \$8.50, while we hold all copyrights. ... On YouTube, after generating 60,000 views, we received \$151.37.<sup>251</sup>

Alan Willaert, Vice-President of the Canadian Federation of Musicians, provided another example of what he described as one of many "anomalies" of current distribution models that disadvantage creators in relation to other members of the music industry:

For instance, Spotify, as 20% of it is owned by the labels, one issue for musicians is that, when Spotify approaches one of the major labels and acquires access to the catalogue, there's a several million dollar fee for that access and then, of course, there's a per stream fee as well. In that huge amount of money that is paid for catalogue access, the musicians see none of that at all—zero.<sup>252</sup>

When confronted with such testimony, Darren Schmidt, Senior Counsel at Spotify, and Mr. Kee, from Google Canada, denied that their employer has any visibility in or into responsibility towards the remuneration of rights-holders once they paid applicable royalties to the entities responsible for distributing these royalties:

Spotify pays SOCAN, CSI and others, and those entities in turn are responsible for distributing those royalties to rights holders, songwriters and music publishers. I should note that I'm leaving a lot out for the sake of brevity—primarily about how in Canada, unlike in some other territories, there is no blanket mechanical licence, which would be very helpful. ... These issues, and the resulting increase in fragmentation they represent, make it more difficult to ensure that songwriters are identified and appropriately paid for their contributions.

... In any event, the fact that Spotify pays entities who then distribute royalties to their members means that Spotify does not generally have visibility into the amount that an individual creator receives for their creative contribution. This is true in Canada and also in the rest of the world.<sup>253</sup>

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Fortin, as an individual); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1925 (David Bussi res, as an individual); INDU (2018), *Evidence*, 1910 (Grandmaison); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 11 May 2018, 1915 (Dusty Kelly, as an individual); INDU (2018), *Evidence*, 1620 (Lefebvre, GMMQ); INDU (2018), *Evidence*, 1640 (Dupr , SPACQ).

251 INDU (2018), *Evidence*, 1925 (Bussi res). But see INDU (2018), *Evidence*, 1630, 1635 (Long, MNS); INDU (2018), *Evidence*, 1610 (Schmidt, Spotify).

252 INDU (2018), *Evidence*, 1625 (Willaert, CFM).

253 INDU (2018), *Evidence*, 1555 (Schmidt, Spotify).

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Part of the challenge we have collectively, I think, as an industry is that oftentimes there are large sums of money ... that are flowing into the music industry writ large, which is where I get these large numbers from, but then they're essentially transferring into a very complicated and opaque web of music licensing agreements that certainly we don't have visibility into, and frankly, neither does anybody else. We're into a particular situation where artists only see what they get at the far end of that process, which doesn't necessarily accord with what they're hearing from us.<sup>254</sup>

Jeff Price, CEO of Audiam Inc., argued that conflicting interests between the new streaming platforms that have come to dominate online music distribution and the creators themselves are responsible for the declining revenues of creators and other rights-holders. According to Mr. Price, the platforms that now dominate music distribution are run, at least for now, with an eye to maximizing short-term returns from the stock market, but have yet to settle on a sustainable revenue model. This would mean that companies like Spotify primarily focus on increasing their valuation, even at the expense of rights-holders:

Spotify, with market capital over \$25 billion, has never made money. YouTube, before it was acquired for \$1 billion, never made money. The value of those entities was predicated on their market share. It's the musicians' music that attracted the users to utilize the technology, which was rewarded by finance and Wall Street in the form of IPOs and sales, and there's nothing wrong with that.

What I do have an issue with is when I hear these companies getting upwards of a trillion-dollar market cap, or a half-trillion-dollar market cap, who have aggregated the world under the umbrellas that we're sitting with here. Facebook Google, Spotify — all wonderful companies — have hundreds of millions, billions, of users aggregated under those umbrellas with market caps up in the tens or hundreds of billions, yet they're turning around and giving someone ... \$0.0001 U.S. per stream on their ad-supported platform. Something's not right.<sup>255</sup>

Rather than restricting safe-harbour provisions, author and activist Cory Doctorow proposed reforming collective rights management and the tariff-setting process to restore fair remuneration to creators and other rights-holders in the online distribution of copyrighted content:

[W]e can create a blanket license regime, administered by a next-generation collecting society with the transparency of an open source project and the analytical nous of Google. We can set a rate for creative works that is judged fair by entertainment giants and creators, and we can set a portion of those revenues aside to go directly to creators, inalienable through contract. Such a system would encourage competition from smaller players (whose royalty pay-outs would be proportionally lower) and would be a

254 INDU (2018), *Evidence*, 1600 (Kee, Google Canada).

255 INDU (2018), *Evidence*, 1600 (Price).



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*guaranteed* way to shift money from Big Tech to entertainment companies and (more importantly) to creators, who might otherwise see any gains moved to the entertainment companies' shareholders.<sup>256</sup>

Such a proposal reflects the argument that the imbalance of power between creators and large intermediaries—including OSPs, but also large record labels and publishers—as well as between small and large intermediaries, is at the root of the declining revenues felt by many Canadian rights-holders, and that addressing the matter in any lasting fashion requires a more diversified approach that includes competition and contract law,<sup>257</sup> as well as facilitating the emergence of different models for the management of copyright that favour creators.<sup>258</sup>

## Committee Observations and Recommendations

Copyright law provides limited tools to effectively address many of the problems reported during this statutory review. Moreover, the Government is constitutionally limited in the legislative measures it could adopt to address these problems. For example, many legislative instruments capable of addressing the imbalance of bargaining power felt by many Canadian creators, such as contract legislation and collective bargaining, rest in the hands of provincial legislatures. The Act alone does not and cannot suffice to ensure that Canadian creators and creative industries receive fair compensation.

The Committee understands that many rights-holders lack the bargaining power to increase the revenues they obtain from OSPs. The Committee also agrees with the principle that OSPs who profit from the dissemination of copyrighted content they do not own should fairly remunerate rights-holders. However, proposed amendments to sections 31.1 and 41.27 of the Act would be too blunt a solution to address the issue, especially since there is no consensus among stakeholders about which OSPs cause problems and why. Subjecting OSPs to increased regulations should also reflect a balanced approach. The Committee finds it questionable, for example, that an OSP's content management policies would require taking down or de-monetizing content uploaded on a platform before giving its uploader the opportunity to respond to allegations of copyright infringement.

256 Doctorow, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1630 (Long, MNS).

257 INDU (2018), *Evidence*, 1555, 1645 (de Beer); INDU (2018), *Evidence*, 1650 (Geist); CCP, *Brief Submitted to INDU*, 7 January 2019. See also INDU (2018), *Evidence*, 1635 (Gendreau).

258 See for example INDU (2018), *Evidence*, 1640 (Dupré, SPACQ).



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Legislators around the world are only starting to develop and implement legislative frameworks to review the proper scope of liability exemptions available to OSPs and require them to fairly remunerate rights-holders. We are yet to see, for example, how EU members will implement the Directive and what results different approaches will yield. The Government should take the time to learn from the successes and failures of these initiatives to determine whether they serve the long-term interests of all Canadians.

The Committee emphasizes that no entity is entitled to safe harbour exceptions—there is no “right” to safe harbour in Canadian copyright law. These exceptions reflect instead the fact that Parliament recognizes that some entities serve an intermediary function that warrants a special status under the Act. However, this status must nonetheless be earned by complying with the Act as a whole. OSPs in particular would be wise to review their practices and the structure of their platforms to ensure that they reflect the full extent of applicable law, including the rules governing both copyright infringement and its exceptions. The Committee therefore recommends:

### **Recommendation 21**

**That the Government of Canada monitor the implementation, in other jurisdictions, of extended collective licensing as well as legislation making safe harbour exceptions available to online service providers conditional to measures taken against copyright infringement on their platforms.**

### **Recommendation 22**

**That the Government of Canada assert that the content management systems employed by online service providers subject to safe harbour exceptions must reflect the rights of rights-holders and users alike.**

## Other Technological Exceptions

Witnesses reported that the introduction of technological exceptions negatively impacted royalties, and that Parliament should limit the scope of the relevant provisions or repeal them.<sup>259</sup> Mr. Chisick provided the example of a decision in which the Board “found that backup copies of music made by commercial radio stations accounted for

259 INDU (2018), *Evidence*, 1610 (Rioux, CMRRA); INDU (2018), *Evidence*, 1730 (Lauzon & Lavallée, SODRAC); UNEQ, *Brief Submitted to INDU*, 24 April 2018; Music Canada, *Brief Submitted to INDU*, 14 December 2018. But see INDU (2018), *Evidence*, 1545 (Rathwell & Kerr-Wilson, Shaw); Kelln, *Brief Submitted to INDU*, 25 May 2018; Concordia University et al., *Brief Submitted to INDU*, 18 June 2018; Albert Ng, *Brief Submitted to INDU*, 4 December 2018. See also Corus, *Brief Submitted to INDU*, 14 December 2018; TELUS Communications Inc. [TELUS], *Brief Submitted to INDU*, 14 December 2018.



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more than 22% of the commercial value of all of the copies that radio stations make. As a result of the expansion of the backup copies exception, the [Board] then proceeded to discount the stations' royalty payments by an equivalent percentage,"<sup>260</sup> a loss estimated to reach \$5.6 million per year.<sup>261</sup> CMRRA and CMuPA proposed that Parliament limit the applicability of the backup copies exception to non-commercial purposes.<sup>262</sup>

Witnesses also commented on the case of ephemeral recordings. CMRRA estimated that removing section 30.9(6) from the Act in 2012 resulted in a loss of \$7 million per year in collected royalties. CMRRA commented that rights-holders also incur significant administrative and enforcement costs to demonstrate when a musical reproduction falls outside of the ephemeral copy exception, which has the net effect of further reducing revenues derived from copyright. Artisti and others called for the reintroduction of section 30.9(6) into the Act to limit the ephemeral-copy exception only to cases where no collective licence is available.<sup>263</sup> More generally, the Society for Reproduction Rights of Authors, Composers and Publishers in Canada maintained that the backup, ephemeral and private copies exceptions do not comply with the "three-step test" of the Berne Convention.<sup>264</sup>

## Committee Observations

The economic rights provided by the Act enable rights-holders to obtain remuneration for the use of copyrighted content when such use has commercial value. Several exceptions in the Act reflect a policy choice about the value of some uses of copyrighted content, such as backup copies, ephemeral recordings, temporary reproductions for technological processes, and reproduction for private purposes. Parliament did not enact these exceptions to deprive rights-holders from sources of revenues, but to take down unjustified revenue streams. If their disappearance unduly distorted the market value of copyrighted content, the Board or the Government could address the matter, if needed, through the tariff-setting process. In any case, amending these provisions so soon after their enactment seems premature.

260 INDU (2018), *Evidence*, 1530 (Chisick).

261 INDU (2018), *Evidence*, 1610 (Rioux, CMRRA).

262 CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018.

263 INDU (2018), *Evidence*, 1540 (Morin & Prigent, Artisti); CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018.

264 INDU (2018), *Evidence*, 1635 (Lauzon & Lavallée, SODRAC).

## INFORMATIONAL ANALYSIS

Several witnesses, many from the technology sector, proposed introducing into the Act a new exception to copyright infringement for informational analysis. Element AI described “informational analysis” as “the derivation of information from data,” for example through text and data analysis, “and not the actual use and commercialization of that data.”<sup>265</sup> The new exception would prevent copyright legislation from hindering the development of AI software, a growing field in Canada.<sup>266</sup>

As Maya Medeiros, Partner at Norton Rose Fullbright Canada, explained, providing clarity on whether the Act allows the unauthorized use of copyrighted materials for informational analysis would assist in the development of AI software:

AI learns to think by reading, listening and viewing data, which can include copyrighted works such as images, video, text and other data.

...

The training process can involve reproductions of the training data, and these can be temporary reproductions to extract features of the data that can be discarded after the training process. ... It is unclear whether the use of copyrighted works for training an AI system is considered copyright infringement if the ... copyright owner’s permission is not obtained. This uncertainty exists even if the initial training is done for research purposes ... and then the trained system is eventually used for commercial purposes. ... This uncertainty can limit the data that is used by AI innovators to train the AI system. The quality of the dataset will impact the quality of the resulting trained algorithm.<sup>267</sup>

265 Element AI, *Brief Submitted to INDU*, 12 October 2018.

266 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 3 October 2018, 1635-1640 (Christian Troncoso, BSA The Software Alliance [BSA]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 3 October 2018, 1645 (Nevin French, Information Technology Association of Canada); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 November 2018, 1545 (Scott Smith, Canadian Chamber of Commerce [CaCC]); INDU (2018), *Evidence*, 1550 (Kee, Google Canada); Microsoft Canada Inc., *Brief Submitted to INDU*, 13 September 2018; CARL, *Brief Submitted to INDU*, 28 September 2018; BSA, *Brief Submitted to INDU*, 12 October 2018; Element AI, *Brief Submitted to INDU*, 12 October 2018; Internet Association, *Brief Submitted to INDU*, 20 November 2018; University of Alberta, *Brief Submitted to INDU*, 20 November 2018; Alberta Machine Intelligence Institute [AMII], Montreal Institute for Learning Algorithms, Quaid Morris, Vector Institute, *Brief Submitted to INDU*, 14 December 2018; Dessa, *Brief Submitted to INDU*, 14 December 2018; Ryerson University, *Brief Submitted to INDU*, 14 December 2018; Google Canada, *Brief Submitted to INDU*, 7 January 2019. See also INDU (2018), *Evidence*, 1700 (McColgan & Owen, CFLA).

267 INDU (2018), *Evidence*, 1625 (Medeiros). See also INDU (2018), *Evidence*, 1635 (Troncoso, BSA); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 3 October 2018, 1625-1630 (Paul Gagnon, Element AI); INDU (2018), *Evidence*, 1550 (Kee, Google Canada); INDU (2018), *Evidence*, 1720 (Tawfik); INDU (2018), *Evidence*, 1555 (Tarantino & Lovrics, IPIC); Microsoft Canada, *Brief Submitted to INDU*, 13 September 2018; BSA, *Brief Submitted to INDU*, 12 October 2018; Element AI, *Brief Submitted to INDU*, 12 October 2018; Internet



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Witnesses suggested introducing the exception by enacting either a specific provision—similar to section 29A of the British CDPA—or by adding “informational analysis” among the purposes of fair dealing under section 29 of the Act. In any case, the exception would be limited to the use of lawfully accessed copyrighted content.<sup>268</sup> IPIC added that, in amending the Act, Parliament should consider how licences and TPMs could impact the effectiveness of the new exception.<sup>269</sup>

**[P]roviding clarity on whether the Act allows the unauthorized use of copyrighted materials for informational analysis would assist in the development of AI software.**

Brush Education was one of the very few witnesses who argued against an exception for informational analysis. It suggested that collective societies should be allowed to licence uses made for the purpose of information analysis, adding that there “is no justification for turning authors and publishers into unpaid suppliers to technology developers—in other words, for requiring a sector that operates on very thin margins to subsidize a sector that can well afford to pay a fair price to its suppliers.”<sup>270</sup>

While he agreed that there are circumstances in which informational analysis should not amount to copyright infringement,<sup>271</sup> Mark Hayes, Partner at Hayes eLaw, proposed that Parliament focus instead on the larger, now-ubiquitous problem of how copyright

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Association, *Brief Submitted to INDU*, 20 November 2018; D’Agostino, *Brief Submitted to INDU*, 10 December 2018; AMII et al., *Brief Submitted to INDU*, 14 December 2018; Dessa, *Brief Submitted to INDU*, 14 December 2018; Google Canada, *Brief Submitted to INDU*, 7 January 2019; Tawfik et al., *Brief Submitted to INDU*, 18 January 2019.

268 INDU (2018), *Evidence*, 1445 (Stewart & Bourne-Tyson, CAUL); INDU (2018), *Evidence*, 1720 (Gagnon, Element AI); INDU (2018), *Evidence*, 1640 (Merkley, CrCC); INDU (2018), *Evidence*, 1715 (Tribe & Aspiazu, OpenMedia); INDU (2018), *Evidence*, 1530 (Kerr-Wilson, BCBC); INDU (2018), *Evidence*, 1550 (Fewer, CIPPIC); INDU (2018), *Evidence*, 1715 (Chapdelaine); INDU (2018), *Evidence*, 1600, 1630 (Tarantino & Lovrics, IPIC); INDU (2018), *Evidence*, 1540 (Geist); Microsoft Canada, *Brief Submitted to INDU*, 13 September 2018; CARL, *Brief Submitted to INDU*, 28 September 2018; CAUL, *Brief Submitted to INDU*, 28 September 2018; CRKN, *Brief Submitted to INDU*, 28 September 2018; BSA, *Brief Submitted to INDU*, 12 October 2018; Element AI, *Brief Submitted to INDU*, 12 October 2018; IFLAI, *Brief Submitted to INDU*, 12 October 2018; Internet Association, *Brief Submitted to INDU*, 20 November 2018; IPIC, *Brief Submitted to INDU*, 4 December 2018; Dessa, *Brief Submitted to INDU*, 14 December 2018; Geist, *Brief Submitted to INDU*, 14 December 2018; AMII et al., *Brief Submitted to INDU*, 14 December 2018; Portage Network, *Brief Submitted to INDU*, 7 January 2019; Tawfik et al., *Brief Submitted to INDU*, 18 January 2019. See also MacEwan University, *Brief Submitted to INDU*, 13 September 2018.

269 IPIC, *Brief Submitted to INDU*, 4 December 2018.

270 Brush Education, *Brief Submitted to INDU*, 5 September 2018.

271 INDU (2018), *Evidence*, 1710 (Hayes); Hayes, *Brief Submitted to INDU*, 20 November 2018.

legislation should treat incidental copying, of which the issue of informational analysis is merely a subset. He invited the Committee to consider informational analysis as part of a possible reinforcement of section 30.71 of the Act, namely the exception for “temporary reproductions for technological processes.”<sup>272</sup> According to Mr. Hayes, relying on an existing and technology neutral exception would prove more efficient than adding a new provision for every innovation.<sup>273</sup>

## Committee Observations and Recommendation

The evidence persuaded the Committee that facilitating the informational analysis of lawfully acquired copyrighted content could help Canada’s promising future in artificial intelligence become reality. The Committee therefore recommends:

### Recommendation 23

**That the Government of Canada introduce legislation to amend the *Copyright Act* to facilitate the use of a work or other subject-matter for the purpose of informational analysis.**

## PERCEPTUAL DISABILITY

In June 2016, to comply with World Intellectual Property Organisation’s Marrakesh Treaty, Parliament amended the Act to ensure that persons with a perceptual disability have access to copyrighted material.<sup>274</sup> These amendments removed some of the legal hurdles that hindered the production of works in formats accessible to persons with a perceptual disability. However, witnesses contended that there is still no significant increase of works published in such formats, despite the fact that technology makes it easier than ever to produce works in such formats, because publishers lack incentives to produce them.<sup>275</sup> **The production of documents in Braille, which remains essential to**

272 But see INDU (2018), *Evidence*, 1630 (Chisick); CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018.

273 INDU (2018), *Evidence*, 1615, 1700 (Hayes); Hayes, *Brief Submitted to INDU*, 20 November 2018. See also D’Agostino, *Brief Submitted to INDU*, 10 December 2018.

274 See also Dara Lithwick, *Legislative Summary of Bill C-11: An Act to amend the Copyright Act (access to copyrighted works or other subject-matter for persons with perceptual disabilities)*, Publication no. 42-1-C11-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 6 May 2016.

275 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 22 October 2018, 1530, 1655 (Lui Greco & Thomas Simpson, Canadian National Institute for the Blind [CNIB]); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 22 October 2018, 1535 (John Rae, Council of Canadians with Disabilities [CCD]).



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help blind people become literate, is decreasing.<sup>276</sup> As John Rae, Chair of the Social Policy Committee of the Council of Canadians with Disabilities (CCD), put it, the “Marrakesh [Treaty] has turned on the tap, but the water’s not running.”<sup>277</sup> He urged both the Government and Parliament to improve their efforts at providing publications in accessible formats.<sup>278</sup>

The lack of copyrighted content available in formats accessible to persons with a perceptual disability not only deprives them of academic and professional development opportunities, but also limits their contribution to the creative economy as consumers:

If I could have access to the magazines available in the shop or the bookstore down the street, I guarantee you that I would be spending a lot more money on consuming media. I don't spend much money, in fact I don't spend any money on media, because the things I really want to read just aren't available. Therefore, I consume what's available.<sup>279</sup>

When questioned on how the Act should define and distinguish “print disability” and “perceptual disability,” the CCD and Canadian National Institute for the Blind (CNIB) responded that Parliament should use consistent and inclusive language to describe disability.<sup>280</sup>

Witnesses suggested different measures to increase the availability of works in formats accessible to persons with a perceptual disability. The CNIB proposed to only grant copyright to literary works available in formats accessible to persons with a print disability.<sup>281</sup> Others proposed that section 32(1) of the Act be amended to allow a person to reproduce a cinematographic work in an accessible format, as it is already the case for literary, musical, artistic, and dramatic works

**As ... the Council of Canadians with Disabilities put it, the “Marrakesh [Treaty] has turned on the tap, but the water’s not running.”**

276 Ibid., 1535, 1705 (Rae, CCD). See also INDU (2018), *Evidence*, 1530 (Greco & Simpson, CNIB).

277 Ibid., 1555 (Greco & Simpson, CNIB).

278 Ibid., 1535 (Rae, CCD).

279 Ibid., 1710 (Greco & Simpson, CNIB).

280 Ibid., 1600 (Greco & Simpson, CNIB); Ibid., 1605 (Rae, CCD).

281 Ibid., 1530 (Greco & Simpson, CNIB); CNIB, *Brief Submitted to INDU*, 22 October 2018.

under this provision.<sup>282</sup> The CCD also suggested providing public funding to publishers to publish works in accessible formats.<sup>283</sup>

## Committee Observations and Recommendation

All Canadians should have the same opportunity to engage with copyrighted content. Canada's international obligations prevent it from attributing copyright to works on the condition that they are disseminated in a format accessible to persons with a perceptual disability. The Government should explore ways to support the production of works in accessible format in consultation with industry representatives and other relevant stakeholders. To ensure progress on this front, the availability of works in accessible formats should be measured on a yearly basis. The Committee therefore recommends:

### Recommendation 24

**That the Government of Canada work with industry and relevant stakeholders to explore ways to support the production of works published in formats specially designed for persons with a perceptual disability, and to measure, on a yearly basis, the availability of works published in such formats.**

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282 Kelly Dermody, Monica S. Fazekas, Athol Gow, Heather Martin, Anne Pottier, Lisl Schoner-Saunders, Cecilia Tellis, Nancy Waite & Mark Weiler, *Brief Submitted to INDU*, 14 December 2018; Janice Adlington, Jacqueline Cato, George Duimovich, Sharon Engel, Vera Fesnak, Ian Gibson, Alex Homanchuk, Charlottte Innerd, Andrea McLellan, Ingrid Moisil, Laura Newton Miller, Joanne Oud, Cheryl Petrie, Anne Pottier, Helen Salmon, Lisl Schoner-Saunders, Victoria Sigurdson, Irene Tencinger, Matt Thomas, Ashley Thomson, Emily Tufts & Sharon Whittle, *Brief Submitted to INDU*, 20 December 2018.

283 INDU (2018), *Evidence*, 1535, 1705 (Rae, CCD).



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## ENFORCEMENT

### NOTICE-AND-NOTICE REGIME

Some witnesses, such as the Canadian Bar Association (CBA), suggested replacing the notice-and-notice regime—established under sections 41.25, 41.26 and 21.27(3) of the Act—with a notice-and-takedown regime that would oblige an OSP, upon receipt of a notice of claimed infringement by a user of their service, to remove or block the infringing content.<sup>284</sup> The CBA argued that, contrary to notice-and-takedown, notice-and-notice incurs “no tangible consequences” against an infringer and therefore offers little actual deterrent against copyright infringement and requires rights-holders to take further steps to enforce their rights.<sup>285</sup> Proponents of notice-and-notice cautioned that notice-and-takedown can result in the removal of non-infringing materials, and as such is more likely to jeopardize users’ rights and freedom of expression online.<sup>286</sup>

Rather than replacing it with a notice-and-takedown regime, other witnesses proposed improving the notice-and-notice regime. Proposals included

- Standardizing the content of the notices, notably to prevent a person from including misleading content in notices such as settlement demands;<sup>287</sup>

284 INDU (2018), *Evidence*, 1535 (Willaert, CFM); AQPM, *Brief Submitted to INDU*, 14 December 2018.

285 INDU (2018), *Evidence*, 1555, 1650, 1655 (Mackenzie & Seiferling, CBA); CBA, *Brief Submitted to INDU*, 4 December 2018. See also INDU (2018), *Evidence*, 1535, 1625 (Willaert, CFM); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 7 June 2018, 1530 (John Lewis, International Alliance of Theatrical Stage Employees [IATSE]); ANEL, *Brief Submitted to INDU*, 18 May 2018; AQPM, *Brief Submitted to INDU*, 14 December 2018; SARTEC, *Brief Submitted to INDU*, 14 December 2018.

286 INDU (2018), *Evidence*, 1910 (Macklem); Sara Bannerman & Charnjot Shokar, *Brief Submitted to INDU*, 26 October 2018; Canadian Network Operators Consortium Inc. [CNOC], *Brief Submitted to INDU*, 5 September 2018; CIPPIC, *Brief Submitted to INDU*, 14 December 2018; Lisa Macklem, *Brief Submitted to INDU*, 14 December 2018. See also CCP, *Brief Submitted to INDU*, 7 January 2019.

287 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 19 September 2018, 1540 (Christian Tacit & Christopher Copeland, CNOC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 26 September 2018, 1540 (David Watt & Kristina Milbourn, Rogers Communications Inc. [Rogers]); INDU (2018), *Evidence*, 1530 (Kaplan-Myrth, TekSavvy); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 1 October 2018, 1535, 1625, 1720 (Ann Mainville-Neeson & Antoine Malek, TELUS); INDU (2018), *Evidence*, 1650 (Tribe & Aspiazu, OpenMedia); Nair, *Brief Submitted to INDU*, 31 May 2018; PIAC, *Brief Submitted to INDU*, 13 June 2018; CNOC, *Brief Submitted to INDU*, 5 September 2018; MacEwan University, *Brief Submitted to INDU*, 13 September 2018; Bannerman & Shokar, *Brief Submitted to INDU*, 26 October 2018; CIPPIC, *Brief Submitted to INDU*, 14 December 2018;



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- Standardizing the form of the notices in a machine-readable format to ease their reception, processing, and delivery;<sup>288</sup>
- Establishing a fee ISPs could charge to process notices to deter abuses of the notice-and-notice regime;<sup>289</sup>
- Requiring rights-holders to only send notices to email addresses ISPs register with the American Registry for Internet Numbers (ARIN) to “ensure that notices are directed to the correct email addresses that ISPs wish to use for processing notices;”<sup>290</sup> and
- Limiting the number of notices a rights-holder can send to an ISP for an alleged infringement of a work associated with a specific IP address within a given period of time.<sup>291</sup>

ARIN observed that the Act should also require that large corporations, ISPs, OSPs and Internet registrars that assign IP numbers to third parties maintain an up-to-date registry of such numbers to facilitate the implementation of the notice-and-notice regime.<sup>292</sup>

## Committee Observations and Recommendations

While the Committee was conducting its statutory review, the Government introduced Bill C-86, which proposed amendments to sections 41.25 and 41.26 of the Act. Only a few witnesses were able to provide testimony on how the changes would affect the functioning of the notice-and-notice regime. That being said, proposals made by many

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Rogers, *Brief Submitted to INDU*, 14 December 2018. But see BCE, *Brief Submitted to INDU*, 14 December 2018.

288 INDU (2018), *Evidence*, 1540 (Tacit & Copeland, CNOC); INDU (2018), *Evidence*, 1530, 1625 (Kaplan-Myrth, TekSavvy); INDU (2018), *Evidence*, 1550 (Rathwell & Kerr-Wilson, Shaw); INDU (2018), *Evidence*, 1535 (Mainville-Neeson & Malek, TELUS).

289 INDU (2018), *Evidence*, 1530 (Kaplan-Myrth, TekSavvy); INDU (2018), *Evidence*, 1540 (Watt & Milbourn, Rogers); INDU (2018), *Evidence*, 1535 (Mainville-Neeson & Malek, TELUS); Bannerman & Shokar, *Brief Submitted to INDU*, 26 October 2018; CIPPIC, *Brief Submitted to INDU*, 14 December 2018. See also Rogers, *Brief Submitted to INDU*, 14 December 2018.

290 INDU (2018), *Evidence*, 1540 (Tacit & Copeland, CNOC); CNOC, *Brief Submitted to INDU*, 5 September 2018. See also American Registry for Internet Numbers [ARIN], *Brief Submitted to INDU*, 9 January 2019.

291 INDU (2018), *Evidence*, 1540 (Tacit & Copeland, CNOC); CNOC, *Brief Submitted to INDU*, 5 September 2018.

292 ARIN, *Brief Submitted to INDU*, 9 January 2019.



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witnesses to reform this regime to curtail abuse ultimately align with the changes the Government proposed in Bill C-86.

However, if the purpose of notice-and-notice is educational, and the new amendments are intended to curb what are understood to be abuses of the system, then it is in stakeholders' interests that the system be as efficient as possible. As such, the proposal that the Government require notices to be sent in a machine-readable format that eases reception, processing, and delivery should be seriously considered. The Committee also believes that the Government should respond to the concerns expressed by ARIN. The Committee therefore recommends:

**Recommendation 25**

**That the Government of Canada make regulations to require notices sent under the notice-and-notice regime be in a prescribed machine-readable format.**

**Recommendation 26**

**That the Government of Canada examine ways to keep IPv6 address ownership information up-to-date in a publicly accessible format similar in form and function to American Registry for Internet Numbers' IPv4 "WHOIS" service.**

## **SITE-BLOCKING, DE-INDEXING, AND OTHER ORDERS**

According to many witnesses, particularly from the audio, TV, and film industries, piracy remains a problem, but the nature of piracy has shifted considerably since the passage of the *Copyright Modernization Act*. In 2012, rights-holders were predominantly concerned with peer-to-peer file-sharing, through which copyrighted works could be shared through sites like The Pirate Bay.

By 2018, peer-to-peer piracy had declined, but other forms of piracy emerged. These new forms of piracy include stream-ripping (copying a work off a legitimate streaming service like Spotify), unauthorized commercial streaming sites, and preloaded set-top boxes (devices that allow a user to easily access online streams of infringing content).<sup>293</sup> Witnesses also focused their attention on platforms like Facebook and YouTube. Author Ann Brocklehurst told the committee that a Google search of her latest book can easily

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293 INDU (2018), *Evidence*, 1535 (Graham & Malcolmson, BCE); INDU (2018), *Evidence*, 1540 (Watt & Milbourn, Rogers); Rogers, *Brief Submitted to INDU*, 14 December 2018.

lead a user to a free PDF version, and that the very day the book was published, it was being distributed for free through Facebook by some of its users.<sup>294</sup>

Given this shifting environment, rights-holders are pushing for simpler, cheaper and faster methods of enforcing their rights. Several of the witnesses who appeared before the Committee were members of the FairPlay Coalition, which submitted a proposal to the CRTC to establish an administrative body that could require ISPs to block access to entities “that are blatantly, overwhelmingly, or structurally engaged in copyright piracy.”<sup>295</sup> The Coalition and its supporters proposed amending the Act to provide rights-holders access to similar, effective tools against copyright infringement occurring online—either through an administrative tribunal or through the courts.

**By 2018, peer-to-peer piracy had declined, but other forms of piracy emerged.**

Some witnesses advocated only for a “site-blocking” remedy, where a rights-holder could require online service providers to block end-user access to an infringing website. Others argued for a “de-indexing” remedy as well, where a rights-holder can obtain an injunction to require search engines to remove infringing websites from their search results.<sup>296</sup> Others still requested that the Act be amended to provide for a court to issue a “blocking order against an ISP requiring an ISP to disable access to stolen content available on preloaded set-top boxes.”<sup>297</sup> BCE Inc. (BCE) and Rogers Communications Inc. (Rogers) offered the broadest suggestion, advocating for a new provision that would allow courts to provide remedies that would compel “all of the intermediaries that form part of the online infrastructure distributing stolen content”<sup>298</sup> to deny service to infringing entities:

294 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 9 May 2018, 1925 (Ann Brocklehurst, as an individual).

295 CRTC, *Telecom Decision CRTC 2018-384*, Ottawa, 2 October 2018, para. 6.

296 INDU (2018), *Evidence*, 1535, 1615, 1620, 1700 (Lewis, IATSE); INDU (2018), *Evidence*, 1635 (Drouin, ADISQ); INDU (2018), *Evidence*, 1620, 1700, 1740 (Noss, MPAC); INDU (2018), *Evidence*, 1550 (Rathwell & Kerr-Wilson, Shaw); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 29 October 2018, 1630 (Lorne Lipkus, Canadian Anti-Counterfeiting Network [CACN]); INDU (2018), *Evidence*, 1535 (Kerr-Wilson, BCBC); INDU (2018), *Evidence*, 1540-1545, 1620 (Smith, CaCC); INDU (2018), *Evidence*, 1645, 1700 (Sookman); IATSE, *Brief Submitted to INDU*, 3 August 2018; AQPM, *Brief Submitted to INDU*, 14 December 2018; CMePA, *Brief Submitted to INDU*, 14 December 2018; Hugh Stephens, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1610 (Mainville-Neeson & Malek, TELUS).

297 INDU (2018), *Evidence*, 1540 (Watt & Milbourn, Rogers). See also INDU (2018), *Evidence*, 1535 (Kerr-Wilson, BCBC).

298 INDU (2018), *Evidence*, 1540 (Watt & Milbourn, Rogers). See also, *Brief Submitted to INDU*, 5 June 2018; CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018; Corus, *Brief Submitted to INDU*,



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This would apply to intermediaries such as ISPs, web hosts, domain name registrars, search engines, payments processors, and advertising networks. In practice this would mean that a new section of the Copyright Act would allow a court to issue an order directly to, for example, a web host to take down an egregious piracy site, a search engine to delist it, a payment processor to stop collecting money for it, or a registrar to revoke its domain.<sup>299</sup>

BCE, Shaw, and Rogers acknowledged that many such remedies are already available to them under common law, both against infringers and intermediaries, but that several hurdles make them ineffective.<sup>300</sup> Injunctions against infringers are hard to enforce since “generally speaking ... piracy operators operate anonymously, operate online and operate outside of Canadian jurisdiction.”<sup>301</sup> Moreover, courts may be reluctant to issue injunctions on non-infringing third parties without guidance from Parliament, which may add costs and delay.<sup>302</sup> The current process was also described as “too slow and too cumbersome,” since it requires complainants “to effectively go and prove the case, and ... then ask for a remedy to the particular problem,” as opposed to a quicker process that would allow obtaining an injunctive relief on a strong *prima facie* case.<sup>303</sup>

Some witnesses also pointed to the *Telecommunications Act*, which states that “[e]xcept where the [CRTC] approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.”<sup>304</sup> They signalled that this provision requires a rights-holder first to seek an injunction against an ISP or other online intermediary in court, then apply to the CRTC for its permission to enforce this injunction, which would amount to an unnecessary duplication of processes.<sup>305</sup>

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14 December 2018; MPAC, *Brief Submitted to INDU*, 14 December 2018; OMM, *Brief Submitted to INDU*, 14 December 2018; Rogers, *Brief Submitted to INDU*, 14 December 2018; BCBC, *Brief Submitted to INDU*, 7 January 2019.

299 INDU (2018), *Evidence*, 1535 (Graham & Malcolmson, BCE).

300 But see INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1930 (Adam Lackman, as an individual).

301 INDU (2018), *Evidence*, 1550 (Graham & Malcolmson, BCE).

302 INDU (2018), *Evidence*, 1700 (Rathwell & Kerr-Wilson, Shaw).

303 INDU (2018), *Evidence*, 1555 (Watt & Milbourn, Rogers).

304 S.C. 1993, c. 38, s. 36.

305 INDU (2018), *Evidence*, 1650 (Graham & Malcolmson, BCE); INDU (2018), *Evidence*, 1700 (Rathwell & Kerr-Wilson, Shaw); INDU (2018), *Evidence*, 1720 (Mainville-Neeson & Malek, TELUS); INDU (2018), *Evidence*, 1535 (Kerr-Wilson, BCBC).

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More generally, Mr. Sookman found that the law currently leaves many important questions unanswered:

There are going to be questions about what type of sites should be blocked. Should they be primarily infringing, or should they be something else? What factors should the court take into account when deciding to make an order? Who should bear the cost of site-blocking orders? What method should be ordered to be used for site blocking? Then, how do we deal with the inevitable attempts to circumvent these orders, which, by the way, courts have said don't undermine their effectiveness?

I believe those questions are fundamental ones for Parliament. Courts can make them up, but we might end up with one or two trips to the Supreme Court and with rights holders and users spending a ton of money.<sup>306</sup>

FairPlay's proposal of an administrative regime raised concerns of procedural fairness among witnesses who feared such a process would "inevitably censor legitimate content and speech online and violate net neutrality protections, all without court oversight."<sup>307</sup> The fact that such orders may also hinder lawful trade would offer another reason to proceed with caution.<sup>308</sup>

Critics of the proposal also focused on whether there really was a strong enough case against online piracy to merit an amendment to allow for more easily accessible injunctions on third parties. John Lawford, Executive Director of the Public Interest Advocacy Centre (PIAC), argued that "the evidence suggests that online piracy is a small and shrinking problem, and that site blocking will have minimal benefits for Canadian creators."<sup>309</sup> Mr. Katz added that because site-blocking can be circumvented, it may not prove as effective at ensuring that a competitive market provides consumers with more convenient and affordable options than pirate sites.<sup>310</sup>

306 INDU (2018), *Evidence*, 1640 (Sookman). See also INDU (2018), *Evidence*, 1535 (Chisick).

307 INDU (2018), *Evidence*, 1650 (Tribe & Aspiazu, OpenMedia). See also INDU (2018), *Evidence*, 1720 (de Beer); INDU (2018), *Evidence*, 1540 (Geist); Geist, *Brief Submitted to INDU*, 14 December 2018; CCP, *Brief Submitted to INDU*, 7 January 2019; Tawfik et al., *Brief Submitted to INDU*, 18 January 2019. See also INDU (2018), *Evidence*, 1540 (Tacit & Copeland, CNOC).

308 INDU (2018), *Evidence*, 1640 (Petricone, CTA); INDU (2018), *Evidence*, 1720 (de Beer).

309 PIAC, *Brief Submitted to INDU*, 13 June 2018. See also INDU (2018), *Evidence*, 1540, 1640 (Tacit & Copeland, CNOC); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 November 2018 1640 (John Lawford, PIAC); CIPPIC, *Brief Submitted to INDU*, 14 December 2018.

310 INDU (2018), *Evidence*, 1640 (Katz). See also INDU (2018), *Evidence*, 1915 (Ryan Regier); INDU (2018), *Evidence*, 1640 (Lawford, PIAC).



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Andy Kaplan-Myrth, Vice-President of Teksavvy Solutions Inc., argued that the FairPlay proposal contradicted the principle of net neutrality—the principle that ISPs should provide equal treatment to all Internet traffic—“without any real urgent justification.”<sup>311</sup> He added not only that site-blocking could be easily circumvented and is thus ineffective,<sup>312</sup> but that the proposal stems from a convergence of interests derived from the vertical integration of telecommunications firms that runs contrary to the role of ISPs as common carriers:

**[Ariel] Katz added that because site-blocking can be circumvented, it may not prove as effective at ensuring that a competitive market provides consumers.**

I don't think we should be focused on blocking other content, because now we're running up against network neutrality in our common carriage roles.

My point is that if we were going to look at illegal content, we would be talking about terrorism content. You know, there are bad things out there.

We carry the bits, and we do that because we're common carriers. We carry the bits without looking at them. Just as you can pick up the phone and speak to another person and say whatever you want on that phone line and that phone company won't cut off your call because of the words you say, we will carry the bits.

I think the large ISPs are preoccupied with copyright in particular, and website blocking to enforce copyright, because of their interests on their media sides.<sup>313</sup>

David Watt, Senior Vice-President at Rogers, responded that there is no inherent conflict between the role an ISP plays in transmitting content and its interests as content owner, and that Canada is governed by strict rules that prevent an ISP such as Roger to favour its own content over others', qualifying the “vertical integration argument” as a red herring.<sup>314</sup> Rogers and BCE added that a reasonable interpretation of the principle of net neutrality would only extend its application to legal content circulating over the Internet,

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311 INDU (2018), *Evidence*, 1530 (Kaplan-Myrth, TekSavvy). See also INDU (2018), *Evidence*, 1540 (Tacit & Copeland, CNOC); INDU (2018), *Evidence*, 1650 (Tribe & Aspiazu, OpenMedia); INDU (2018), *Evidence*, 1540 (Geist).

312 INDU (2018), *Evidence*, 1645, 1705 (Kaplan-Myrth, TekSavvy). But see INDU (2018), *Evidence*, 1630, 1645 (Watt & Milbourn, Rogers).

313 INDU (2018), *Evidence*, 1600 (Kaplan-Myrth, TekSavvy).

314 INDU (2018), *Evidence*, 1600 (Watt, Rogers). See also INDU (2018), *Evidence*, 1605 (Graham & Malcolmson, BCE). But see INDU (2018), *Evidence*, 1710 (Mainville-Neeson & Malek, TELUS).

meaning that it would and should not prevent ISPs from blocking illegal content such as materials that infringe copyright.<sup>315</sup>

There may be a possible compromise in amending the Act to allow a court to issue a site-blocking and de-indexing order, provided that such amendments also include rigorous measures to prevent overreach and infringements of freedom of expression.<sup>316</sup> A number of witnesses suggested drawing inspiration from the Australian *Copyright Act*.<sup>317</sup> The Canadian Network Operators Consortium commented that, should Parliament enact a site-blocking regime, it should also allow ISPs to recover the cost of implementing and administering blocking mechanisms, notably to ensure that such requirements do not put too high a burden on small ISPs.<sup>318</sup>

## Committee Observations and Recommendation

The fight against piracy should focus more on large-scale, commercial infringers, and less on individual Canadians who may or may not understand that they are engaged in infringement. This makes sense from a practical perspective and from the perspective of the distinction in the Act between the severity of commercial and non-commercial infringement. The Committee therefore agrees that there is value in clarifying within the Act that rights-holders can seek injunctions to deny services to persons demonstrably and egregiously engaged in online piracy, provided there are appropriate procedural checks in place. The Committee also supports amending the *Telecommunications Act* to remove any procedural duplication or unnecessary hurdles.

The Committee does not, however, support the development of an administrative regime to these ends. It is for the courts to adjudicate whether a given use constitutes copyright infringement and to issue orders in consequence. The courts already have the expertise necessary to protect the interests of all involved parties.

The Committee emphasizes that the enforcement of copyright is made especially difficult by the vertical integration of ISPs and content providers. Parliament and the

315 INDU (2018), *Evidence*, 1605 (Watt, Rogers); INDU (2018), *Evidence*, 1605 (Graham & Malcolmson, BCE). See also INDU (2018), *Evidence*, 1535 (Lewis, IATSE); INDU (2018), *Evidence*, 1700 (Noss, MPAC).

316 INDU (2018), *Evidence*, 1550 (Rathwell & Kerr-Wilson, Shaw); INDU (2018), *Evidence*, 1645 (Chisick); INDU (2018), *Evidence*, 1555-1600 (Tarantino & Lovrics, IPIC). See also INDU (2018), *Evidence*, 1650 (Kaplan-Myrth, TekSavvy); INDU (2018), *Evidence*, 1550 (Lawford, PIAC); But see INDU (2018), *Evidence*, 1720 (de Beer); INDU (2018), *Evidence*, 1540 (Geist); Geist, *Brief Submitted to INDU*, 14 December 2018.

317 INDU (2018), *Evidence*, 1630, 1635 (Smith, CaCC); Rogers, *Brief Submitted to INDU*, 14 December 2018; Stephens, *Brief Submitted to INDU*, 14 December 2018. But see INDU (2018), *Evidence*, 1700 (Knopf).

318 INDU (2018), *Evidence*, 1545 (Tacit & Copeland, CNOC).



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courts need to be particularly careful that the preservation of net neutrality and of the rights of all parties, including those of the public, are fully considered. It is not hard to imagine a situation where one vertically integrated ISP—rights-holder seeks an injunction that would apply to another ISP—rights-holder, who would gladly provide it with little contest given that they share similar interests in the outcome of the case. In such situations, where the actual alleged infringer is most likely *ex parte*, the risk for overreach is obvious.<sup>319</sup> The Committee therefore recommends:

#### **Recommendation 27**

**Following the review of the *Telecommunications Act*, that the Government of Canada consider evaluating tools to provide injunctive relief in a court of law for deliberate online copyright infringement and that paramount importance be given to net neutrality in dealing with impacts on the form and function of Internet in the application of copyright law.**

## **ANTI-COUNTERFEITING MEASURES**

To the CBA, the anti-counterfeiting enforcement measures laid out in sections 44 to 45 of the Act are “cumbersome and disproportionately place significant financial and procedural burdens on rights-holders.”<sup>320</sup> In particular, the CBA took issue with the fact that rights-holders may rely on the Canadian Border Services Agency to temporarily detain imported counterfeited goods, but not to seize and destroy those goods without a court order. Lorne Lipkus, Chair of the Canadian Anti-Counterfeiting Network (CACN), noted that during this temporary detention, importers of counterfeit goods often fail to respond to requests from rights-holders, adding costs and complications to the process.<sup>321</sup> The CBA and the CACN thus proposed to establish a “simplified procedure” under which the importer would be notified of the allegation that its imported goods are counterfeit and provided a short time to respond. If it failed to respond, it would be deemed to have consented to the release of those goods to the rights-holder, who could then proceed to their destruction.<sup>322</sup>

319 See also Doctorow, *Brief Submitted to INDU*, 14 December 2018.

320 CBA, *Brief Submitted to INDU*, 4 December 2018.

321 INDU (2018), *Evidence*, 1710 (Lipkus, CACN).

322 *Ibid.*, 1710 (Lipkus, CACN); INDU (2018), *Evidence*, 1555, 1630 (Mackenzie & Seiferling, CBA).



## STATUTORY DAMAGES

Critics of section 38.1 of the Act generally fell into two broad camps. In the first camp, some witnesses took issue with the upper limits on the amounts of statutory damages a court may award a rights-holder. Ken Thompson, Chair of ALAC, argued that the \$5,000 ceiling for non-commercial infringement and the fact that it applies to multiple acts, rather than per act, “make the remedy ... potentially nothing more than a single licence fee for many non-commercial infringements.”<sup>323</sup> ACP submitted that the legal fees alone required to pursue a non-commercial infringer would exceed whatever statutory award might result under the Act, and that Parliament should increase the limit of statutory damages to discourage systematic infringement.<sup>324</sup> Along similar lines, the Canadian Association of Professional Image Creators and the Professional Photographers of Canada proposed raising the maximum limit for commercial copyright infringement to \$50,000, arguing that the current \$20,000 limit is “outdated” and implies to “creators that their work is not highly valued.”<sup>325</sup>

In the second camp, other witnesses submitted that the entire structure of statutory damages needs reconsidering. Copibec argued that the distinction between non-commercial and commercial infringement, first added in 2012, “continues to blur in the digital world” and thus prevents the courts from fixing effective remedies.<sup>326</sup> Ann Mainville-Neeson, Vice-President of Telus, suggested that

**[S]ome witnesses took issue with the upper limits on the amounts of statutory damages a court may award a rights-holder.**

“statutory damages can be completely detached from ... the actual harms suffered” and that, as a result, courts must be given the discretion to set damages in a way that corresponds with the circumstances of each case, including whether the defendant acted in bad faith.<sup>327</sup> The UNEQ also proposed to make statutory damages

323 INDU (2018), *Evidence*, 1620 (Thompson & Hebb, ALAC).

324 INDU (2018), *Evidence*, 1530 (Rollans & Edwards, ACP); ACP, *Brief Submitted to INDU*, 3 August 2018. See also INDU (2018), *Evidence*, 1600 (Caron, OBPO); UNEQ, *Brief Submitted to INDU*, 24 April 2018; Copibec, *Brief Submitted to INDU*, 31 May 2018; AMBP, *Brief Submitted to INDU*, 3 August 2018; Fernwood Publishing, *Brief Submitted to INDU*, 3 August 2018; Brush Education, *Brief Submitted to INDU*, 5 September 2018; RAAVQ, *Brief Submitted to INDU*, 26 October 2018. See also INDU (2018), *Evidence*, 1725 (Price).

325 CAPIC & PPC, *Brief Submitted to INDU*, 4 July 2018.

326 Copibec, *Brief Submitted to INDU*, 31 May 2018. See also INDU (2018), *Evidence*, 1550 (Gendreau); CCI, *Brief Submitted to INDU*, 21 September 2018.

327 INDU (2018), *Evidence*, 1530 (Mainville-Neeson & Malek, TELUS).



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commensurate with the circumstances of the case in order to provide enough deterrence against copyright infringement.<sup>328</sup>

Proponents of maintaining the status quo on statutory damages submitted that the current limits are essential to maintaining the balance between rights-holders' and users' rights Parliament achieved in 2012.<sup>329</sup> More specifically, the upper limit of statutory damages for non-commercial copyright infringement provides users with the confidence to rely on copyright exceptions and engage in socially desirable activities, such as research.<sup>330</sup> Similarly, some educational institutions argued that the threat of unpredictable statutory damages for unintentional non-commercial copyright infringement would compel them to enter into costly but otherwise disadvantageous licensing agreements.<sup>331</sup> To increase the predictability of the copyright system, several Canadian intellectual property law scholars proposed to only allow awards of statutory damages in relation to publicly registered works, as it is the case in the US.<sup>332</sup>

## Committee Observations and Recommendation

To ensure statutory damages remain relevant and effective at deterring copyright infringement, the Committee finds that their lower and upper limits provided under sections 38.1(1), 38.1(2) and 38.1(3) of the Act should be raised to the extent necessary to account for inflation on the basis of the year in which they were originally set. To reduce the need to constantly review these provisions, Parliament could empower the Government to periodically increase these limits to take inflation into account. The Committee therefore recommends:

328 UNEQ, *Brief Submitted to INDU*, 24 April 2018. But see Concordia University et al., *Brief Submitted to INDU*, 18 June 2018.

329 University of Winnipeg, *Brief Submitted to INDU*, 5 September 2018; University of Waterloo, *Brief Submitted to INDU*, 14 December 2018.

330 University of Guelph, *Brief Submitted to INDU*, 4 July 2018; Concordia University et al., *Brief Submitted to INDU*, 18 June 2018; CARL, *Brief Submitted to INDU*, 28 September 2018; CCP, *Brief Submitted to INDU*, 7 January 2019; Tawfik et al., *Brief Submitted to INDU*, 18 January 2019.

331 University of Calgary, *Brief Submitted to INDU*, 5 September 2018; ACAD, *Brief Submitted to INDU*, 14 December 2018; Athabasca University, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1540 (Geist); Internet Archive & Internet Archive Canada, *Brief Submitted to INDU*, 14 December 2018.

332 Tawfik et al., *Brief Submitted to INDU*, 18 January 2019.

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**Recommendation 28**

**That the Government of Canada introduce legislation amending the *Copyright Act* to increase upper and lower limits of statutory damages provided under sections 38.1(1), 38.1(2) and 38.1(3) of this Act to account for inflation, based on the years when they were originally set.**



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## COLLECTIVE ADMINISTRATION OF RIGHTS

### PROCEEDINGS AND MANDATE OF THE COPYRIGHT BOARD

Witnesses prevalently complained about the inefficiency of the proceedings of the Board, more specifically the amount of time it takes to certify a tariff.<sup>333</sup> Closely tied to the issue of delay is that of retroactive application. For the parties involved, this can create a sudden and significant liability, and waiting for a tariff may discourage businesses from entering the market. In the words of Patrick Curley, President of Third Side Music, it is “hard to do business when you have no idea what the tariff will be for a period of five years after use.”<sup>334</sup>

To resolve issues of delays and retroactive tariffs, witnesses offered a variety of recommendations that included increasing the resources of the Board,<sup>335</sup> renewing the tenure of its members in a timely manner,<sup>336</sup> enhancing the Board’s case-management

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- 333 INDU (2018), *Evidence*, 1555 (Davidson & Therrien, Universities Canada); INDU (2018), *Evidence*, 1700 (Amyot & Hanna, CIC); INDU (2018), *Evidence*, 1650, 1715 (Degen, WUC); INDU (2018), *Evidence*, 1715 (Rollans & Edwards, ACP); INDU (2018), *Evidence*, 1515 (Campbell & Balcom, UNB); INDU (2018), *Evidence*, 1700, 1735, 1755 (Curley, TSM); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1940 (David Murphy, as an individual); INDU (2018), *Evidence*, 1650 (Thompson & Hebb, ALAC); INDU (2018), *Evidence*, 1650 (Muller, Colleges Ontario); INDU (2018), *Evidence*, 1650 (Ludbrook, Ryerson University); INDU (2018), *Evidence*, 1530 (Greenberg & Peters, AMBP); INDU (2018), *Evidence*, 1530 (Wheeler, Romaniuk & Andrew, University of Manitoba); INDU (2018), *Evidence*, 1725 (Callison); INDU (2018), *Evidence*, 1515 (Middlemadd & Taylor, BCLA); INDU (2018), *Evidence*, 1705 (McGuffin, CMuPA); INDU (2018), *Evidence*, 1700 (Anderson & McAllister, ACTRA); INDU (2018), *Evidence*, 1610 (Rioux, CMRRA); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 24 September 2018 (Freya Zaltz, National Campus and Community Radio Association [NCCRA]); INDU (2018), *Evidence*, 1550, 1645 (Dupré, SPACQ); INDU (2018), *Evidence*, 1615 (Kerr-Wilson, BCBC); INDU (2018), *Evidence*, 1615 (Smith, CaCC); INDU (2018), *Evidence*, 1605 (Price); WUC, *Brief Submitted to INDU*, 18 June 2018; CCI, *Brief Submitted to INDU*, 21 September 2018; University of Alberta, *Brief Submitted to INDU*, 20 November 2018; CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018; Hotel Association of Canada [HAC], Restaurants Canada & Retail Council of Canada, *Brief Submitted to INDU*, 14 December 2018.
- 334 INDU (2018), *Evidence*, 1700 (Curley, TSM). See also INDU (2018), *Evidence*, 1440 (Martin & Graham, University of Guelph); INDU (2018), *Evidence*, 1650 (Ludbrook, Ryerson University); INDU (2018), *Evidence*, 1620 (Dorval & Wheeler, CAB); INDU (2018), *Evidence*, 1615 (Kerr-Wilson, BCBC).
- 335 INDU (2018), *Evidence*, 1555 (Davidson & Therrien, Universities Canada); INDU (2018), *Evidence*, 1700 (Amyot & Hanna, CIC); INDU (2018), *Evidence*, 1700, 1745 (Curley, TSM); INDU (2018), *Evidence*, 1550, 1645 (Dupré, SPACQ); Broadview Press, *Brief Submitted to INDU*, 16 April 2018; CCI, *Brief Submitted to INDU*, 21 September 2018; University of Alberta, *Brief Submitted to INDU*, 20 November 2018; CIPPIC, *Brief Submitted to INDU*, 14 December 2018.
- 336 INDU (2018), *Evidence*, 1625 (Davidson & Therrien, Universities Canada).

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powers and simplifying its procedures,<sup>337</sup> imposing mandatory decision-making timelines,<sup>338</sup> preventing the Board from issuing decisions with retroactive effects,<sup>339</sup> limiting expert evidence parties can submit to the Board,<sup>340</sup> and allowing collective societies referred to under section 67 of the Act to negotiate rates directly with users.<sup>341</sup>

While Shaw shared others' concerns regarding the efficiency of proceedings before the Board, it "recommended that the [Act] be amended to expressly confirm that users are entitled to negotiate as a group when negotiating with a collective, as well as when applying to the Board for arbitration when a collective and users are unable to agree on royalty rates or related terms and conditions."<sup>342</sup> Such an amendment would "permit users to partially offset the imbalance of power that would otherwise be enjoyed by the near-monopoly collectives," as well as further increase the efficiency of the collective rights management system.<sup>343</sup>

Appearing before the Committee after the tabling of Bill C-86, the Board itself made two proposals. First, it proposed amending the Act to require that any agreement made between users and collectives be provided to the Board to help set similar tariffs. The Board maintained that while it can order parties to provide such agreements, amendments to the Act could provide a more efficient process to gather information the Board considers essential to the fulfilment of its mandate.<sup>344</sup> Mr. Chisick later urged the Committee to show caution in the matter:

Users may be reluctant to enter into agreements with collectives if they know they're going to be filed with the Copyright Board and thus become a matter of public record.

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- 337 INDU (2018), *Evidence*, 1700 (Amyot & Hanna, CIC); INDU (2018), *Evidence*, 1530 (Wheeler, Romaniuk & Andrew, University of Manitoba); INDU (2018), *Evidence*, 1705 (McGuffin, CMuPA); CCI, *Brief Submitted to INDU*, 21 September 2018; CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018.
  - 338 INDU (2018), *Evidence*, 1705 (McGuffin, CMuPA); CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018; HAC et al., *Brief Submitted to INDU*, 14 December 2018.
  - 339 INDU (2018), *Evidence*, 1715 (McColgan & Owen, CFLA); INDU (2018), *Evidence*, 1515 (Stewart & Bourne-Tyson, CAUL); INDU (2018), *Evidence*, 1515 (Campbell & Balcom, UNB); INDU (2018), *Evidence*, 1700 (Curley, TSM); INDU (2018), *Evidence*, 1440 (Martin & Graham, University of Guelph); INDU (2018), *Evidence*, 1650 (Ludbrook, Ryerson University); INDU (2018), *Evidence*, 1530 (Wheeler, Romaniuk & Andrew, University of Manitoba); HAC et al., *Brief Submitted to INDU*, 14 December 2018.
  - 340 INDU (2018), *Evidence*, 1645 (Tamaro & St-Onge, FNC).
  - 341 INDU (2018), *Evidence*, 1745 (Curley, TSM); INDU (2018), *Evidence*, 1715 (MacKay, Re:Sound); INDU (2018), *Evidence*, 1615 (Smith, CaCC); INDU (2018), *Evidence*, 1605 (Price); CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018; HAC et al., *Brief Submitted to INDU*, 14 December 2018.
  - 342 Shaw, *Brief Submitted to INDU*, 14 December 2018.
  - 343 Shaw, *Brief Submitted to INDU*, 14 December 2018.
  - 344 INDU (2018), *Evidence*, 1625 (McDougall, Thériault & Audet, Copyright Board).



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The concern would be, of course, that services in the marketplace are operating in a very competitive environment. The last thing they want to do is make the terms of their confidential agreements known to everyone, including their competitors.<sup>345</sup>

Second, the Board requested the power to issue interim decisions on its own motion to provide it with an “additional tool to influence the pace and dynamics of tariff-setting proceedings.”<sup>346</sup>

With the adoption of Bill C-86, section 66.501 was added to the Act and came into force on 1 April 2019. The provision marks the first attempt in the Board’s history to provide explicit criteria to guide its decision-making processes and outcomes. Under the new section, these criteria include “what would have been agreed upon between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm’s length and free of external constraints,” “the public interest,” as well as “any other criterion that the Board considers appropriate.”

The introduction of section 66.501 of the Act came late in the Committee’s review, so only a few witnesses could comment on it. Mr. Chisick applauded the introduction of mandatory rate-setting criteria as it would contribute to a “more timely, efficient and predictable tariff process.”<sup>347</sup> Nevertheless, Mr. Chisick expressed concern about the addition of “any other criterion that the Board considers appropriate.” He argued that, by making the criteria open-ended, the Board’s decision-making might remain or even become more unpredictable and costlier, as parties seek to provide evidence to meet a growing list of undefined principles and criteria.<sup>348</sup>

Other witnesses took issue with the inclusion of “public interest.” According to Mr. Katz, “[i]ntroducing public interest, in principle, is a good thing, except that the Board could then introduce anything under “public interest” and could actually empty out all the other criteria.”<sup>349</sup> Mr. Sookman agreed, arguing that using the term “competitive market” was sufficient to reduce the uncertainty of the tariff-setting process and help increase the speed of proceedings before the Board.<sup>350</sup>

345 INDU (2018), *Evidence*, 1535 (Chisick).

346 INDU (2018), *Evidence*, 1625 (McDougall, Théberge & Audet, Copyright Board).

347 INDU (2018), *Evidence*, 1535 (Chisick). See also INDU (2018), *Evidence*, 1615 (Smith, CaCC); CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018.

348 INDU (2018), *Evidence*, 1535 (Chisick).

349 INDU (2018), *Evidence*, 1630 (Katz).

350 INDU (2018), *Evidence*, 1630 (Sookman). See also INDU (2018), *Evidence*, 1605, 1655, 1725 (Boyer).

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### **Committee Observations and Recommendations**

Over the course of its review, this Committee received nearly unanimous testimony that the Board is failing to provide the certainty, stability, and clarity that Canadian creative industries require to grow and compete. Witnesses described an institution that lacked the resources and the authority to curtail lengthy tariff-setting processes, that struggled to implement some of the exceptions added to the Act by the CMA, and whose decisions are too-often overturned upon judicial review.

The issue of delay of proceedings before the Board is exacerbated by complexity and uncertainty surrounding collective rights administration and the tariff-setting process. Collective rights administration in Canada is undeniably a complicated system, a product of three interrelated factors. First, the Board is, with some exceptions, allowed to structure its procedures freely and flexibly. As a result, proceedings before the Board can take any number of different forms, creating an intricate and unpredictable environment for parties.

Second, the Board considers applications made under several different regimes across several different industries involving several different types of works. These applications combine substantive complexity (making economic valuations in rapidly changing technological contexts) with legal complexity (applying the Act to new practices and understanding the extent of its statutory power in each regime). As noted above, uncertainty over the binding nature of different types of Board decisions has played a sizeable role in recent litigation at the Federal Court of Appeal and the SCC.

Third, the Board considers applications from collective societies that have highly dissimilar structures and practices. Even those relying on the same tariff might have different distribution models or have received different grants of rights from their members. Since users and rights-holders interact with collectives, rather than with the Board itself, the practices and policies of copyright collectives play a significant role in how the public engages with copyright law.

Through Bill C-86, Parliament enacted a sweeping reform of the Board in the later stages of the review to streamline and simplify its proceedings. The Committee notes that many proposals made in this review to improve the speed and efficiency of Board proceedings were included in submissions on the consultation around Board reform and are now reflected in the changes made to the Act through Bill C-86. The Committee also



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acknowledges that the Government increased the annual financial resources of the Board by 30% in 2018.<sup>351</sup>

While the Committee is heartened that the Government heard and responded to stakeholders, it is limited in how much more it can say on the reform of the Board. The changes have only very recently come into effect, and only a few witnesses were able to comment on them as they were being considered in Parliament. **The Committee feels that it is too early to assess whether the Government's approach will result in increased efficiency, speed, and certainty in tariff setting.**

**The Government should consider amending the Act to allow and encourage users to negotiate with a collective society and apply to the Board as a group. Doing so may not only encourage fair licensing practices, but also increase the overall efficiency of the collective rights management regime, including the proceedings before the Board. The Committee therefore recommends:**

#### **Recommendation 29**

**That the Government of Canada introduce legislation amending the *Copyright Act* to clarify that users can negotiate with a collective society as a group and to allow users to jointly apply to the Copyright Board of Canada, when the Board deems it appropriate.**

From a perspective of enhancing the transparency of the tariff-setting process, a list of criteria detailing the mandate of the Board has much to offer. A mandate should allow the public to understand the Board's role and in turn give the Board a sound basis for building consistent procedure and principled tariffs. A mandate might also encourage the Board to adopt a more active role in the oversight of collectives and their internal operations, driven by a public interest concern.

Mr. Chisick, Mr. Katz, and Mr. Sookman shared the underlying concern that the criteria set out under the new section 66.501 of the Act are written in such a broad fashion that they may reduce the certainty and predictability that Bill C-86 was intended to provide. Indeed, it is not difficult to imagine a scenario where the Board either interprets "public interest" in a way that at least one party finds objectionable or applies some as-of-yet not defined principle in a way no party could predict, prompting a costly, lengthy appeal process that could have significant effects on the application or interpretation of other tariffs.

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351 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 5 December 2018, 1635 (Kahlil Cappuccino & Pierre-Marc Lauzon, DCH).



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This Committee thus urges the Government and the Board to proceed carefully in defining, elaborating on, and adding to the decision-making criteria enumerated under section 66.501 of the Act. Detail could and should be added via regulations, always with an eye to promoting remuneration, access to copyrighted content, and transparency. The Committee therefore recommends:

### Recommendation 30

**That the Government of Canada report to the House of Commons Standing Committee on Industry, Science and Technology within three years on the effectiveness of the reform of the Copyright Board of Canada, including measures introduced and amended by the *Budget Implementation Act, 2018, No. 2*.**

## RADIO ROYALTY EXEMPTION

Witnesses from across the music industry were nearly unanimous in requesting the repeal of section 72(2)—previously 68.1(1)(a)—of the Act.<sup>352</sup> Music Canada suggested that the radio royalty exemption provided by this section “amounts to an \$8 million annual cross-industry subsidy paid by artists and their recording industry partners to large, vertically integrated and highly profitable media companies. The costs to creators since inception have been \$150 million.”<sup>353</sup> Laurie McAllister, Director of the Alliance of Canadian Cinema, Television and Radio Artists, noted that—unlike when the provision was enacted in 1997 “as a temporary solution” to ease the introduction of neighbouring rights in Canadian copyright law “for a struggling commercial radio industry”—today’s commercial radio sector, “now vertically integrated and run by a handful of large media corporations,” can afford to pay legitimate royalties in full.<sup>354</sup>

Radio broadcasters, however, were resistant. Corus Entertainment Inc. (Corus) argued that Parliament did not enact section 72(2) of the Act as a transitional measure, but to mitigate “Canadian radio’s competitive disadvantage” vis-à-vis American radio stations,

352 INDU (2018), *Evidence*, 1610 (Long, MNS); INDU (2018), *Evidence*, 1620 (Thompson & Hebb, ALAC); INDU (2018), *Evidence*, 1535 (Willaert, CFM); INDU (2018), *Evidence*, 1540 (Baptiste & Daigle, SOCAN); INDU (2018), *Evidence*, 1600 (Drouin, ADISQ); INDU (2018), *Evidence*, 1615 (MacKay, Re:Sound); INDU (2018), *Evidence*, 1705 (Tarlton, Ticketmaster); CFM, *Brief Submitted to INDU*, 31 May 2018; SOCAN, *Brief Submitted to INDU*, 13 June 2018; ALAC, *Brief Submitted to INDU*, 14 December 2018; Barker, *Brief Submitted to INDU*, 14 December 2018; CIMA, *Brief Submitted to INDU*, 14 December 2018; OMM, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1555 (Tarantino & Lovrics, IPIC).

353 INDU (2018), *Evidence*, 1550 (Henderson, Music Canada). See also INDU (2018), *Evidence*, 1605 (Morin & Prigent, Artisti); Music Canada, *Brief Submitted to INDU*, 14 December 2018.

354 INDU (2018), *Evidence*, 1600 (Anderson & McAllister, ACTRA). See also INDU (2018), *Evidence*, 1545 (Morin & Prigent, Artisti); INDU (2018), *Evidence*, 1615 (MacKay, Re:Sound).



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which do not pay royalties for neighbouring rights. Corus also noted that commercial radio broadcasters already pay \$91 million every year in Board-set royalty tariffs and that the repeal of the exemption would only serve the interests of foreign conglomerates at the expense of “a vital Canadian medium.”<sup>355</sup> In any case, the National Campus and Community Radio Association urged the Committee to retain the exemption under section 72(3) of the Act, which spares small-budget, non-profit community radio stations from having to pay heavy royalty fees.<sup>356</sup>

The CBA added that the rhetoric of a “subsidy” from struggling artists to successful radio conglomerates obscured the fact that the music industry itself absorbs most of royalty income paid by the radio broadcasters. According to the CBA, and that removing the exemption would penalize 60% of Canadian radio stations, most of them local stations, without significantly increasing the revenues of Canadian creators.<sup>357</sup>

## Committee Observations and Recommendation

Music industry representatives focused on the “radio royalty exemption” as a piece of the “value gap,” or the discrepancy between the economic value produced by the music industry and the economic value that ultimately accrues to its rights-holders. There is no need, however, to endorse the value-gap theory to conclude that this exemption deprives the music industry of millions of dollars of revenues annually and that it is difficult to justify why it should apply indiscriminately to all commercial broadcasters, no matter how profitable they are.

The Committee expresses concern about the impact of removing the radio royalty exemption on small, independent, and Canadian-controlled commercial broadcasters who provide important services to their communities. The Committee thus favours scaling down the exemption rather than removing it entirely from the Act. For instance, the exemption could only be available to broadcasters whose total revenues do not exceed a specified amount, or the exempted revenues would progressively diminish as the revenues of a broadcaster or the size of its operations increase. In any case, parent

355 Corus, *Brief Submitted to INDU*, 14 December 2018. See also House of Commons, INDU (2018), *Evidence*, 1540, 1615 (Dorval & Wheeler, CAB); CAB, *Brief Submitted to INDU*, 13 September 2018.

356 INDU (2018), *Evidence*, 1530, 1605, 1625 (Zaltz, NCCRA); See also INDU (2018), *Evidence*, 1725 (MacKay, Re:Sound); Alliance des radios communautaires du Canada, Association des radiodiffuseurs du Québec & NCCRA, *Brief Submitted to INDU*, 31 May 2018.

357 House of Commons, INDU (2018), *Evidence*, 1540, 1555, 1620, 1700 (Dorval & Wheeler, CAB). See also INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 17 October 2018, 1540 (Debra McLaughlin, Radio Markham York Inc.); Corus, *Brief Submitted to INDU*, 14 December 2018. But see INDU (2018), *Evidence*, 1615 (MacKay, Re:Sound).

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and subsidiary entities should be taken into account when determining the would-be beneficiary's total revenues or the extent of its operations to avoid that large enterprises take advantage of the exemption by operating multiple wireless transmission systems.

As for community stations and other non-profits, the Act already allows the Governor in Council to enact regulations in order to define "community systems," which, under its section 72(3) would retain the exemption for all their revenues, even above \$1.25 million. This distinction between profit and non-profit stations is also considered by the Board when setting radio royalties and reflects a distinction that appears throughout the Act between commercial and non-commercial purposes. The Committee endorses any approach that would remove this exemption for organizations that make a profit and do not, as community and campus radio stations do, primarily serve a non-commercial purpose. The Committee therefore recommends:

### **Recommendation 31**

**That the Government of Canada introduce legislation amending section 72(2) of the Copyright Act to ensure that the radio royalty exemption only applies to small, independent broadcasters.**

**That the Government of Canada make regulations to define "community systems" under section 72(6) of the Copyright Act in order to identify broadcasters to which section 72(3) of this Act applies.**

## MANDATORY TARIFFS

Witnesses raised the question of whether tariffs set by the Board should be mandatory to users. This question is especially contentious after several educational institutions decided not to renew their licensing relationship with Access Copyright. The ACP, the Writers' Union of Canada and the Canadian Copyright Institute asserted that users will not abide by the decisions of the Board unless its tariffs are mandatory to users. While they asserted that tariffs fixed by the Board are already mandatory to users under the Act, they proposed that Parliament enact legislation to clearly settle the matter.<sup>358</sup> The Board itself invited the Committee to consider if Parliament should clarify the

358 INDU (2018), *Evidence*, 1630 (Rollans & Edwards, ACP); INDU (2018), *Evidence*, 1650, 1705 (Degen, WUC); INDU (2018), *Evidence*, 1405, 1440 (Hebb & Harnum, CCI); WUC, *Brief Submitted to INDU*, 18 June 2018; ACP, *Brief Submitted to INDU*, 3 August 2018; CCI, *Brief Submitted to INDU*, 21 September 2018. See also IPA, *Brief Submitted to INDU*, 9 May 2018; House of Anansi Press/Groundwood Books [HAP], *Brief Submitted to INDU*, 25 April 2018; Fernwood Publishing, *Brief Submitted to INDU*, 3 August 2018. But see CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018.



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mandatory nature of tariffs fixed under section 71(2) of the Act—previously its section 70.2(2).<sup>359</sup>

Stakeholders from the educational sector vigorously opposed mandatory tariffs. They argued that educational institutions should be free to efficiently manage their resources at a time when traditional licensing models are rejected in favour of alternatives deemed to be more cost-effective. Mandatory tariffs would force these institutions to commit funds to—and sometimes pay twice for—licensing agreements and copyrighted content that fail to meet the needs of faculty, researchers and students.<sup>360</sup>

**While they asserted that tariffs fixed by the Board are already mandatory to users under the Act, [some witnesses] proposed that Parliament enact legislation to clearly settle the matter.**

More generally, Mr. Knopf added that “Board tariffs are mandatory only for [collective societies] but optional for users, who remain free to choose how they can best legally clear their copyright needs.”<sup>361</sup>

## Committee Observations

It seems evident that a tariff approved by the Board under section 70 of the Act should only be mandatory to the parties of a licensing agreement to which the tariff applies—no stakeholder argued otherwise. The Committee notes that Parliament has amended

359 INDU (2018), *Evidence*, 1630 (McDougall, Thériège & Audet, Copyright Board). See also INDU (2018), *Evidence*, 1630 (Lauzon & Lavallée, SODRAC).

360 See for example INDU (2018), *Evidence*, 1620 (Davidson & Therrien, Universities Canada); INDU (2018), *Evidence*, 1540 (Swartz & Haigh, CARL); INDU (2018), *Evidence*, 1715 (McColgan & Owen, CFLA); INDU (2018), *Evidence*, 1405, 1515 (Stewart & Bourne-Tyson, CAUL); INDU (2018), *Evidence*, 1440 (Martin & Graham, University of Guelph); INDU (2018), *Evidence*, 1500 (Wheeler, Romaniuk & Andrew, University of Manitoba); INDU (2018), *Evidence*, 1905 (Elves); INDU (2018), *Evidence*, 1540, 1545, 1610 (Noel & Churchill, CMEC); INDU (2018), *Evidence*, 1540, 1555 (Marshall, University of Calgary); Robert Tiessen, *Brief Submitted to INDU*, 22 June 2018; Universities Canada, *Brief Submitted to INDU*, 4 July 2018; University of Guelph, *Brief Submitted to INDU*, 4 July 2018; CAUT, *Brief Submitted to INDU*, 3 August 2018; CIC, *Brief Submitted to INDU*, 3 August 2018; CMEC, *Brief Submitted to INDU*, 5 September 2018; University of Calgary, *Brief Submitted to INDU*, 5 September 2018; University of Winnipeg, *Brief Submitted to INDU*, 5 September 2018; MacEwan University, *Brief Submitted to INDU*, 13 September 2018; SAIT, *Brief Submitted to INDU*, 21 September 2018; UBC, *Brief Submitted to INDU*, 21 September 2018; CARL, *Brief Submitted to INDU*, 28 September 2018; CAUL, *Brief Submitted to INDU*, 28 September 2018; University of Lethbridge, *Brief Submitted to INDU*, 28 September 2018; SFU, *Brief Submitted to INDU*, 15 October 2018; University of Alberta, *Brief Submitted to INDU*, 20 November 2018; ACAD, *Brief Submitted to INDU*, 14 December 2018; ECUAD, *Brief Submitted to INDU*, 14 December 2018; NorQuest College, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1900 (Selman).

361 INDU (2018), *Evidence*, 1620 (Knopf). See also Knopf, *Brief Submitted to INDU*, 7 January 2019.

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provisions governing the fixing of royalty rates in individual cases as part of the latest reform of the Board. Unlike the previous section 70.2(1) of the Act, its new section 71(1) refers not to a “person” but to a “user” defined under its new section 71(6). The Committee leaves to the Board and to the courts the task of determining whether these new provisions change the state of the law regarding the nature of royalties fixed in individual cases. The Committee will have the opportunity to re-examine this issue should the Government report on the implementation of the reform of the Board, as recommended above.

## STATUTORY DAMAGES

Several witnesses suggested allowing any collective society referred to in section 70.1 of the Act to elect to recover statutory damages for infringement of their repertoire under its section 38.1(4), rather than only societies that managed rights referred to in section 38(4.1) of the Act. Proponents of extending statutory damages to all collective societies argued that there is no compelling reason why some remedies should be available to some collective societies, but not others when they all operate under tariffs set by the Board. Instead, all collective societies and their affiliates should benefit from the advantages statutory damages provide, namely encouraging licensing, deterring infringement, and improving the overall effectiveness of the collective rights management regime.<sup>362</sup>

Witnesses who opposed the proposal fear collective societies would use them to coerce lawful users into entering licensing agreements they would not otherwise enter.<sup>363</sup> Mr. Hayes reported that the societies that currently can seek statutory damages under section 38.1(4) do engage in such practices.<sup>364</sup> To prevent them from using statutory damages “as a threat to force users to accept questionable demands for royalties using aggressive and often questionable interpretations of the Act and relevant tariffs,” he proposed that a collective society should only be allowed to recover such damages when

362 INDU (2018), *Evidence*, 1705 (Rollans & Edwards, ACP); INDU (2018), *Evidence*, 1605, 1720 (Swaile, CPC); INDU (2018), *Evidence*, 1630, 1635 (Sookman); HAP, *Brief Submitted to INDU*, 25 April 2018; WUC, *Brief Submitted to INDU*, 18 June 2018; CPC, *Brief Submitted to INDU*, 4 July 2018; Access ACP, *Brief Submitted to INDU*, 3 August 2018; Copyright, *Brief Submitted to INDU*, 7 September 2018; CCI, *Brief Submitted to INDU*, 21 September 2018; Access Copyright et al., *Brief Submitted to INDU*, 14 December 2018. See also CMRRA & CMuPA, *Brief Submitted to INDU*, 14 December 2018.

363 INDU (2018), *Evidence*, 1600 (de Beer); INDU (2018), *Evidence*, 1620 (Knopf); INDU (2018), *Evidence*, 1540, 1720 (Geist). See also University of Manitoba, *Brief Submitted to INDU*, 14 December 2018.

364 INDU (2018), *Evidence*, 1610 (Hayes).



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the defendant “has not raised a legitimate dispute concerning the amount payable or the application of the tariff to the defendant.”<sup>365</sup>

Other witnesses argued that, because this section provides little discretion to courts to modulate statutory damages depending on the extent of the infringement, allowing any collective society to recover such damages would expose users to extensive liability risk and thus discourage them from relying on statutory exceptions:

We understand that in recent government consultations on reforming the Copyright Board of Canada, Access Copyright proposed statutory damages in the range of three to 10 times the royalty for even the smallest case of infringement, with no discretion for the courts to vary from this. We also understand that Access Copyright is currently pursuing royalties, at a rate of \$26 per FTE student for the university sector, through rate-setting proceedings at the Copyright Board of Canada. This rate has not yet been confirmed by the board, but if it were, this would mean statutory damages for a university, hypothetically, in the range of \$78 to \$260 per FTE student at the institution. That scenario would be difficult for any publicly funded institution.<sup>366</sup>

Mr. Knopf and Mr. Geist asserted that a collective society should only be allowed to recover statutory damages when it is subjected to a mandatory tariff-setting process,<sup>367</sup> which, following the reform of the Board, would lead to repealing section 38.1(4) of the Act.

## Committee Observations and Recommendation

Without contradicting the merits of the reform of the Board brought about by Bill C-86, the Committee acknowledges that it created a formal inequality within the Act. Indeed, while the vast majority of collective societies now operate under the same legal regime, only collective societies licensing acts referred to in section 38.1(4.1) of the Act may elect to recover an award of statutory damages under its section 38.1(4), whereas most collective societies can only recover royalties they would have been entitled to.

Unless the evidence shows that some collective societies should have more remedies than others, the Act should strive to treat like cases alike. In other words, either all collective societies should be able to recover an award of statutory damages or none of

<sup>365</sup> Hayes, *Brief Submitted to INDU*, 20 November 2018.

<sup>366</sup> INDU (2018), *Evidence*, 1540 (Marshall, University of Calgary). See also INDU (2018), *Evidence*, 1905 (Elves); SFU, *Brief Submitted to INDU*, 15 October 2018; University of Winnipeg, *Brief Submitted to INDU*, 5 September 2018; ECUAD, *Brief Submitted to INDU*, 14 December 2018.

<sup>367</sup> INDU (2018), *Evidence*, 1620 (Knopf); INDU (2018), *Evidence*, 1540, 1720 (Geist); Knopf, *Brief Submitted to INDU*, 7 January 2019.

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them should. The Committee received no substantial evidence that remedies available to collective societies should differ from one sector of operation to another or on the basis of their licensing activities. Arguments for or against statutory damages must therefore be considered generally.

The Committee finds that collective societies would benefit from being able to seek statutory damages as much as any rights-holder. The Committee also finds that, in practice, section 38.1(4) of the Act led to unintended consequences that would threaten to spread throughout the copyright system if it were to apply to any collective society, namely the risk that a collective society use the threat of statutory damages to strong-arm users into entering disadvantageous licensing agreements. Extending section 38.1(4) of the Act to all collective societies would also require the Government to review the basis on which statutory damages are calculated. While that basis may be appropriate in relation to the acts referred to in section 38.1(4.1) of the Act, it may be inappropriate in relation to other tariffs.

For example, what would be an acceptable amount of statutory damages for the infringement of a single work included in the repertoire of a collective society occurring in a classroom of 50 full-time students, in a school of 5,000 full-time students, and when the relevant approved tariff amounts to \$5 per full-time students? Some stakeholders might find that the statutory damages should be directly proportionate to the infringement and amount to between \$750 and \$2,500. Other stakeholders would respond that, to effectively deter infringement, these damages should, at least, exceed \$25,000—the price of a blanket licence for that school. Others might argue that the appropriate award, in this case, lies between \$2,500 and \$25,000. In any case, the Committee finds it excessive that, for the infringement of a single work made for non-commercial purposes and implicating only 1% of the student body of a school acting in good faith, the Act would require a court to rule that this school pay no less than \$75,000 in damages to the collective society.

Moreover, given that statutory damages would only be awarded in relation to an approved tariff, allowing any collective society to recover such damages would likely encourage many if not most of these societies to launch proceedings before the Board instead of privately negotiating licensing agreements with users. Given that almost all witnesses—including collective societies—rightfully complained about lengthy tariff-setting proceedings throughout the review of the Act, the Government should be careful not to negate any gain recent amendments to the Act aim to achieve.

The Committee is thus inclined to allow any collective society to recover an award in statutory damages but finds the current section 38.1(4) of the Act to be inadequate to



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implement such a policy. Should Parliament extend this remedy to all collective societies as well as the rights-holders who have authorized them to act on their behalf, it should do so with a more sophisticated regime that reflects, notably, the following policy objectives: encouraging fair licensing practices, deterring copyright infringement, enabling courts to award proportional statutory damages that account for different types of tariffs, and ensuring that proceedings before the Board proceed efficiently and in a timely manner. The Committee therefore recommends:

### **Recommendation 32**

**That the Government of Canada evaluate the forms of statutory damages available under the *Copyright Act* to a collective society or a rights-holder who has authorized a collective society to act on their behalf where applicable royalties are set by the Copyright Board of Canada and the defendant has not paid them.**

## **PRIVATE COPYING REGIME**

Several witnesses called for extending the private copying regime established under Part VIII of the Act to digital devices, including smart phones and tablets, to compensate rights-holders for copies made on such devices.<sup>368</sup> The Canadian Private Copying Collective (CPCC) reported that revenues from copying levies decreased from \$38 million to \$3 million from 2004 to 2016 even though the number of music tracks Canadians copied doubled in the same period. The fact that consumers copy music onto devices such as smart phones rather than on the blank audio recording devices to which the

368 INDU (2018), *Evidence*, 1500-1505 (Prieur, ANEL); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1655, 1715 (Annie Morin & Martin Lavallée, CCM); INDU (2018), *Evidence*, 1700 (Curley, TSM); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 8 May 2018, 1905 (Julien Bidar, as an individual); INDU (2018), *Evidence*, 1940 (Murphy); INDU (2018), *Evidence*, 1535 (Willart, CFM); INDU (2018), *Evidence*, 1545, 1610 (Lefebvre, GMMQ); INDU (2018), *Evidence*, 1550, 1630 (McGuffin, CMuPA); INDU (2018), *Evidence*, 1540, 1635 (Morin & Prigent, Artisti); INDU (2018), *Evidence*, 1550 (Henderson, Music Canada); INDU (2018), *Evidence*, 1600 (Anderson & McAllister, ACTRA); INDU (2018), *Evidence*, 1550 (MacKay, Re:Sound); INDU (2018), *Evidence*, 1540, 1640 (Baptiste & Daigle, SOCAN); INDU (2018), *Evidence*, 1600 (Drouin, ADISQ); INDU (2018), *Evidence*, 1615 (Rioux, CMRRA); INDU (2018), *Evidence*, 1630, 1745 (Lauzon & Lavallée, SODRAC); INDU (2018), *Evidence*, 1530 (Payette, PMPA); INDU (2018), *Evidence*, 1555 (Plante & Hénault, SARTEC); INDU (2018), *Evidence*, 1550 (Dupré, SPACQ); INDU (2018), *Evidence*, 1555 (Schlittler & Lowe, SACD); INDU (2018), *Evidence*, 1650 (Boyer); CCM, *Brief Submitted to INDU*, 7 May 2018; UNEQ, *Brief Submitted to INDU*, 24 April 2018; ANEL, *Brief Submitted to INDU*, 18 May 2018; CFM, *Brief Submitted to INDU*, 31 May 2018; SOCAN, *Brief Submitted to INDU*, 13 June 2018; RAAVQ, *Brief Submitted to INDU*, 26 October 2018; Marcel Boyer, *Brief Submitted to INDU*, 28 November 2018; ARRQ, *Brief Submitted to INDU*, 14 December 2018; CIMA, *Brief Submitted to INDU*, 14 December 2018; OMM, *Brief Submitted to INDU*, 14 December 2018; SARTEC, *Brief Submitted to INDU*, 14 December 2018. See also INDU (2018), *Evidence*, 1630 (Lauzon & Lavallée, SODRAC); INDU (2018), *Evidence*, 1645-1650 (Novotny & Posner, SCGC); INDU (2018), *Evidence*, 1630, 1645 (Azzaria); SACD & SCAM, *Brief Submitted to INDU*, 12 June 2018; ACTRA, *Brief Submitted to INDU*, 14 December 2018; AQPM, *Brief Submitted to INDU*, 14 December 2018.



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regime currently applies, such as CD-R, explains the decrease in revenues. CPCC argued that the private copy regime should be made technology neutral, as in some European countries, and expected that the price of the levy would amount to an average of \$3 per digital device and would not affect their retail price.<sup>369</sup>

According to CPCC, the private copy levy is the most efficient way to implement the principle that rights-holders should be compensated for the use of their content, even though they may not have the means to control these reproductions. The amount of the levy may acknowledge the fact that not all users will use their device for that purpose. Moreover, manufacturers of smart phones such as Apple already pay a levy for Bluetooth, whether or not their consumers use this feature.<sup>370</sup> Noting the mass use of copyrighted content, Ms. Gendreau added that refusing to modernize the private copy regime reflects a “misguided approach of individual enforcement of copyright on the Internet.”<sup>371</sup>

**[W]itnesses who proposed the creation of the \$40-million-a-year fund portrayed it as a short-term solution, [but] the Internet Association found it a more effective way to directly support artists ... than the private copying regime.**

Opposing the proposal, OpenMedia argued that it “ignores the decrease in private music copying with the rise of subscription-based services, and the fact that people use smart phones for a wide variety of reasons far beyond music consumption—let alone illegal music consumption.”<sup>372</sup> PIAC also found the proposal unfair as it “makes the person who uses only licensed content pay twice: once for a licensed copy of the content, and again for others who are presumed to violate the Act.”<sup>373</sup> The Internet Association warned that levies on digital devices could well exceed \$3, as it is the case in some European countries. Indeed, before digital devices were excluded from the regime, the Board had

369 INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 14 June 2018, 1540, 1605 (Lisa Freeman & Lyette Bouchard, Canadian Private Copying Collective [CPCC]); CPCC, *Brief Submitted to INDU*, 14 December 2018.

370 INDU (2018), *Evidence*, 1625, 1715 (Freeman & Bouchard, CPCC).

371 INDU (2018), *Evidence*, 1550 (Gendreau).

372 INDU (2018), *Evidence*, 1640 (Tribe & Aspiazu, OpenMedia). See also INDU (2018), *Evidence*, 1550 (Lawford, PIAC); INDU (2018), *Evidence*, 1650 (Knopf); Internet Association, *Brief Submitted to INDU*, 20 November 2018.

373 INDU (2018), *Evidence*, 1550 (Lawford, PIAC). See also PIAC, *Brief Submitted to INDU*, 13 June 2018.



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approved a levy of \$75 for devices with a storage capacity of 30 or more gigabytes.<sup>374</sup> CTA doubted that imposing a levy on digital devices would resolve tensions associated with the mass use of copyrighted content, as rights-holder continue to seek aggressive measures against the unauthorized use of content online even when levies apply to digital devices.<sup>375</sup> Mr. Knopf asserted that Part VIII of the Act had long lost its *raison d'être* and should therefore be repealed.<sup>376</sup>

In the hope that Parliament amend the Act to extend the private copy regime to digital devices and to show “that the government is recognizing the importance of performers and others getting paid for this type of copying,”<sup>377</sup> Music Canada and other witnesses proposed that the Government commit public funds over the next four years to provide rights-holders \$40 million per year—an amount estimated to reflect the loss of royalties from the private copy regime.<sup>378</sup> Proponents of this fund based its amount on the estimated revenues a levy applicable to smart phones and tablets should generate annually.<sup>379</sup> While most witnesses who proposed the creation of the \$40-million-a-year fund portrayed it as a short-term solution, the Internet Association found it a more effective way to directly support artists—as opposed to record labels—than the private copying regime.<sup>380</sup>

## Committee Observations and Recommendation

Given the contradictory evidence the Committee received on the matter, the Government should extensively assess the opportunity to extend the private copying regime to digital devices. Relevant departments should look to other jurisdictions to determine, notably, how these regimes impact the retail prices of the digital devices on which they apply. The Committee therefore recommends:

374 Internet Association, *Brief Submitted to INDU*, 20 November 2018.

375 CTA, *Brief Submitted to INDU*, 11 September 2018.

376 INDU (2018), *Evidence*, 1625 (Knopf).

377 INDU (2018), *Evidence*, 1650 (Henderson, Music Canada).

378 INDU (2018), *Evidence*, 1550, 1640 (Henderson, Music Canada); INDU (2018), *Evidence*, 1640 (Anderson & McAllister, ACTRA); INDU (2018), *Evidence*, 1540, 1610 (Freeman & Bouchard, CPCC); INDU (2018), *Evidence*, 1650 (Baptiste & Daigle, SOCAN); Barker, *Brief Submitted to INDU*, 14 December 2018; CPCC, *Brief Submitted to INDU*, 14 December 2018; Music Canada, *Brief Submitted to INDU*, 14 December 2018.

379 INDU (2018), *Evidence*, 1620 (Freeman & Bouchard, CPCC).

380 Internet Association, *Brief Submitted to INDU*, 20 November 2018.

STATUTORY REVIEW OF THE COPYRIGHT ACT

**Recommendation 33**

**That the Government of Canada study the private copying regimes in place in other countries with a view to identifying the digital environment, the distribution of royalties flowing from the private copying levy, and the impact on consumers on which a private copying levy applies, including the impact of the private copying regime on the retail prices of the different types of digital device to which they apply.**

**TRANSPARENCY**

A few witnesses called for increased regulatory oversight of collective societies, notably to increase transparency in the collective administration of rights.<sup>381</sup> For example, Michael McDonald, Executive Director of the Canadian Alliance of Student Associations (CASA), observed that licensing fees demanded by a collective society can vary dramatically from one period to another, with little to no explanation:

We're also extremely concerned that the fees proposed in other sectors by Access Copyright have so far been found to be much higher than deemed appropriate by the Copyright Board. This is deeply troubling, and we're calling on the committee to ensure that the Copyright Board provides clear, public rationale for why fees exist and to demand public accounting for those who wish to operate tariffs.<sup>382</sup>

Mr. Knopf agreed that the Board could emphasize disclosure, notably on “the average and median return to members of collectives on an annual basis.”<sup>383</sup> As noted by Ms. Gendreau, other jurisdictions, including in Europe, regulate the internal management of collective societies: “I would think that such rules, even though they are probably perceived by collectives as annoying, should actually be embraced precisely because they would give greater legitimacy to their work.”<sup>384</sup>

Other witnesses raised the issue of representation in proceedings before the Board. They argued that parties affected by a tariff may lack the opportunity to appear before the Board and defend their interests, which in turn diminishes the openness and transparency of the collective rights management regime.<sup>385</sup> CASA thus recommended that the tariff-setting process be amended to allow “public interest and non-commercial

381 INDU (2018), *Evidence*, 1515 (Stewart & Bourne-Tyson, CAUL).

382 INDU (2018), *Evidence*, 1535 (McDonald, CASA).

383 INDU (2018), *Evidence*, 1635 (Knopf).

384 INDU (2018), *Evidence*, 1625 (Gendreau).

385 INDU (2018), *Evidence*, 1535 (McDonald, CASA); INDU, *Evidence*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 15 October 2018, 1535 (Kate Cornell, Canadian Dance Assembly).



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stakeholders to intervene in hearings and contribute to legal arguments.”<sup>386</sup> While it acknowledged that it might impact the speed and efficiency of proceedings before the Board, CIPPIC also proposed to allow interveners to participate to the tariff-setting process, as opposed to only in its appeal process.<sup>387</sup>

## Committee Observations and Recommendations

While the tariff-setting process could benefit from allowing interveners to participate in proceedings before the Board, at this point the Committee is wary of recommending it. The reform of the Board having only recently began, bringing further substantial changes to the tariff-setting process would make it difficult for the Government to assess whether the reform succeeded at improving its speed and efficiency. Once they have improved, the Government will be able to determine whether these proceedings can accommodate interveners. In the meantime, users can continue to make representations to the Board, notably under section 68.3(1)(c) of the Act, while other stakeholders can intervene in the appeal process or advise users at any other time.

**Fairness starts with transparency.**

Copyright-dependent industries suffer from what Mr. Price referred to as a “black box” problem: creators create, users use, and somewhere in between, increasingly large sums of money are collected by a plethora of intermediaries, including producers, publishers, labels, distributors, OSPs, studios, and collective societies.<sup>388</sup> While they provide essential services, when this Committee pressed intermediaries to explain the declining standards of living of Canadian creators, many claimed ignorance and blamed each other, or claimed to suffer as much as creators despite evidence to the contrary. Meanwhile, creators and users blame each other for what goes on in the black box, even though in practice neither of them has much to say over how much of the money users put through one side of the box will exit to creators from the other side.

Fairness starts with transparency. Every copyright transaction should allow its parties to clearly ascertain the scope of each transferred right, along with the corresponding remuneration—a measure “found to have the most significant positive effect on the

386 CASA, *Brief Submitted to INDU*, 4 July 2018.

387 INDU (2018), *Evidence*, 1615 (Fewer, CIPPIC).

388 INDU (2018), *Evidence*, 1710, 1725 (Price).

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contractual position and the remuneration of authors.”<sup>389</sup> Any person with an interest in a work or other subject-matter should be able to track all revenues made from it along its value chain to be able to determine how these revenues were shared and among whom—a principle reflected in article 19 of the new EU Directive.

Legislation could compel private agreements transferring a right provided under the Act to specify the scope of every transfer and its corresponding remuneration, but without prescribing the terms themselves. To further strengthen the bargaining position of creators, the transfer of future copyrighted content could also be prohibited. Doing so, however, would likely require enacting rules pertaining to contract law, which may belong within the legislative powers of provincial legislatures rather than those of Parliament under the *Constitution Act, 1867*. The Committee therefore recommends:

**Recommendation 34**

**That the Government of Canada evaluate the constitutional feasibility of establishing minimal standards in private agreements relating to a transfer of a right provided by the *Copyright Act*.**

Parliament would stand on stronger constitutional grounds if it were to demand more transparency from the collective rights management regime. In most creative industries, collective societies continue to play a critical role in reducing the transaction costs of licensing copyrighted content and protecting it from infringement. Collective societies thus serve an important market-structuring function, but in so doing are granted monopolistic or quasi-monopolistic powers. They should play a role in developing the kind of transparency that is crucial to a healthy cultural sector. **Parliament will be much more inclined to increase the means of collective societies—including the remedies available to them—if the content of their repertoire, their licensing practices, and their distribution schemes are transparent to users, rights-holders, and policymakers alike.**

The Committee insists that the Board consider whether it can require a degree of transparency in collective rights management, extending to both collective societies and their licensees. Section 67.2 of the Act already provides a basis to do so, as well as the Board’s power to set the terms and conditions of licences. The Act could also require collective societies to file licensing agreements with the Board outside of the tariff-setting process and allow the Board to consider the aggregate information as part of its decision process, but prohibit the Board from disclosing the content of any specific

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389 Lucie Guibault, Olivia Salamaca & Europe Economics, *Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of their Works*, Brussels, European Commission, 2016, p. 237.



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licensing agreement filed by a collective society, similar to rules governing the provision of information to the Patented Medicine Prices Review Board.<sup>390</sup> Ultimately it would be to the benefit of creators and users, who would all get a clearer sense of the value that collective societies—and collective rights management as a whole—can and do provide. The Committee therefore recommends:

#### **Recommendation 35**

**That the Copyright Board of Canada review whether provisions of the *Copyright Act* empower the Board to increase the transparency of collective rights management to the benefit of rights-holders and users through the tariff-setting process, and report to the House of Commons Standing Committee on Industry, Science and Technology within two years.**

#### **Recommendation 36**

**Given the important role of collective societies in the copyright framework and in the collective administration of rights, that the Government of Canada consider the benefits and mechanisms for increasing the transparency of collective societies, particularly with regards to their operations and the disclosure of their repertoire.**

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390 *Patent Act*, R.S.C., 1985, c. P-4, s. 87-88.

## CONCLUSION

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A parliamentary report of this nature must find a compromise between different perspectives. Any stakeholder has a preferred course of action that will be appealing, when considered on its own. Finding the best course of action, however, becomes harder as soon as different viewpoints are taken into account. Things get more complicated, but in doing so they also come closer to reality. Reviewing the Act is not about deciding who is right between stakeholders, but about capturing as many perspectives as possible to ensure that, on the whole, the resulting recommendations reflect the reality of living together.

This report was informed by many different perspectives, which is why no single stakeholder may find it entirely satisfactory. The fact that this report will provoke disagreements among various stakeholders speaks of the depth of its substance and the quality of the process that led to it: copyright policy raises complex and multifaceted issues about which people reasonably disagree. This report's success lies in making stakeholders feel compelled to respond to it with passion, integrity, and rigour – whether or not they agree with its content. It is the review process as a whole, including how stakeholders respond to the report, that helps Government determine its next course of action.

The Committee does not contradict itself by underlining the value of the review process on the one hand, and by recommending that Parliament repeal the provision that initiated it on the other. There is no need to repeat why the Committee recommended dispensing with a particular way to review the Act. However, this recommendation also leaves room for a different perspective: there is no wrong time to discuss the Act. Nobody needs to wait five years before making a case for change. The conversation on copyright is ongoing and dynamic. Instead of ending this conversation, the report will serve as a platform from which it can move forward.

The Committee thanks all who took part in the review of the Act. Whether you did so as the representative of an organisation or as an individual, by providing oral or written testimony, by participating in the Committee's town halls, or by using another way to make your views known, the members of the Committee deeply appreciated your insight. It was a privilege to learn about your perspective. We look forward to doing it again.

## APPENDIX A LIST OF WITNESSES

The following table lists the witnesses who appeared before the Committee at its meetings related to this report. Transcripts of all public meetings related to this report are available on the Committee's [webpage](#) for this study.

Organizations and Individuals	Date	Meeting
<b>Department of Canadian Heritage</b>	2018/02/13	95
Ian Dahlman, Manager Creative Marketplace and Innovation		
Lara Taylor, Director Creative Marketplace and Innovation		
Nathalie Théberge, Director General Creative Marketplace and Innovation and Deputy Director of Investments		
<b>Department of Industry</b>	2018/02/13	95
Robert DuPelle, Senior Policy Advisor Copyright and Trademark Policy, Marketplace Framework Policy Branch		
Mark Schaan, Director General Marketplace Framework Policy Branch		
Martin Simard, Director Copyright and Trademark Policy Directorate		
<b>Campus Stores Canada</b>	2018/04/17	101
Shawn Gilbertson, Manager, Course Materials University of Waterloo		
<b>Canadian Association of University Teachers</b>	2018/04/17	101
Pamela Foster, Director, Research and Political Action		
Paul Jones, Education Officer		
<b>Canadian Federation of Students</b>	2018/04/17	101
Charlotte Kiddell, Deputy Chairperson		



<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Universities Canada</b> Paul Davidson, President Wendy Therrien, Director External Relations and Research	2018/04/17	101
<b>Canadian Alliance of Student Associations</b> Michael McDonald, Executive Director	2018/04/24	102
<b>Canadian Association of Research Libraries</b> Susan Haigh, Executive Director Mark Swartz, Program Officer	2018/04/24	102
<b>Canadian Research Knowledge Network</b> Carol Shepstone, Past Vice-Chair, Chief Librarian Ryerson University	2018/04/24	102
<b>Union des écrivaines et des écrivains québécois</b> Suzanne Aubry, President Laurent Dubois, General Manager	2018/04/24	102
<b>Association of Canadian Publishers</b> Kate Edwards, Executive Director Glenn Rollans, President	2018/04/26	103
<b>Canadian Federation of Library Associations</b> Katherine McColgan, Executive Director Victoria Owen, Chief Librarian University of Toronto Scarborough	2018/04/26	103
<b>Colleges and Institutes Canada</b> Denise Amyot, President and Chief Executive Officer Mark Hanna, Associate Dean The Business School, Humber Institute of Technology and Advanced Learning	2018/04/26	103
<b>The Writers' Union of Canada</b> John Degen, Executive Director	2018/04/26	103
<b>As an individual</b> Andrea Bear Nicholas, Professor Emeritus	2018/05/07	106
<b>Association of Nova Scotia University Teachers</b> Teresa Workman, Communications Manager	2018/05/07	106

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Canadian Publishers Hosted Software Solutions</b> James Lorimer, Treasurer	2018/05/07	106
<b>Council of Atlantic University Libraries</b> Donna Bourne-Tyson, Chair of the Board of Directors and University Librarian Dalhousie University Andrea Stewart, Board of Directors Liaison to the Copyright Committee and Director of Libraries and Educational Technology	2018/05/07	106
<b>Dalhousie Faculty Association</b> David Westwood, President	2018/05/07	106
<b>Music Nova Scotia</b> Scott Long, Executive Director	2018/05/07	106
<b>Nimbus Publishing</b> Terrilee Bulger, Co-owner	2018/05/07	106
<b>University of New Brunswick</b> Lesley Balcom, Dean Libraries H.E.A. (Eddy) Campbell, President and Vice-Chancellor	2018/05/07	106
<b>As individuals</b> Denis Amirault, Student and Musician Saint Mary's University Alison Balcom, Vice-President Internal University of New Brunswick Carol Bruneau, Author Joshua Dickson, Copyright Officer University of New Brunswick Libraries Jordan Ferguson, Student Acadia University Roger Gillis, Copyright Librarian Dalhousie University Jill MacLean, Writer Brett McLenithan, Broadview Press	2018/05/07	107

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
Ossama Nasrallah, President Saint Mary's University Students' Association Harry Thurston, Writer		
<b>Association des distributeurs exclusifs de livres en langue française</b>	2018/05/08	108
Benoit Prieur, Director General		
<b>Association nationale des éditeurs de livres</b>	2018/05/08	108
Richard Prieur, Executive Director		
<b>Coalition for Culture and Media</b>	2018/05/08	108
Martin Lavallée, Lawyer Annie Morin		
<b>Concordia University</b>	2018/05/08	108
Guylaine Beaudry, Vice-President of Digital Strategy and University Librarian Nicolas Sapp, Lawyer, Partner, ROBIC University Secretariat		
<b>Fédération nationale des communications</b>	2018/05/08	108
Pascale St-Onge, President Normand Tamaro, Lawyer		
<b>Third Side Music Inc.</b>	2018/05/08	108
Patrick Curley, President Business and Legal Affairs		
<b>Union étudiante du Québec</b>	2018/05/08	108
Guillaume Lecorps, President		
<b>As individuals</b>	2018/05/08	109
Melikah Abdelmoumen Matis Allali, General Secretary Fédération des associations étudiantes du campus de l'Université de Montréal Julie Barlow, Writer Tyrone Benskin Julien Bidar, President Éditions Outloud Alain Brunet, Journalist		

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
Emmanuelle Bruno		
David Bussi�res, Singer-songwriter		
Luc Fortin, Musician		
Jean Lachapelle, Editor		
Adam Lackman		
Pierre Lapointe, Singer-songwriter		
Eli MacLaren, Assistant Professor Department of Literature, McGill University		
Nancy Marrelli		
David Murphy, Music Editor		
Pierre-Michel Tremblay, Writer		
Martin Valli�res, Vice-President �ditions CEC		
Sylvie Van Brabant, Founding President Productions du Rapide-Blanc		
<b>Artists and Lawyers for the Advancement of Creativity</b>	2018/05/09	110
Marian Hebb, Member of the Board of Directors		
Ken Thompson, Chair		
<b>Canadian Copyright Institute</b>	2018/05/09	110
William Harnum, Chair		
Marian Hebb, Vice-Chair		
<b>Canadian Society of Children's Authors, Illustrators and Performers</b>	2018/05/09	110
Sylvia McNicoll, Author		
<b>Colleges Ontario</b>	2018/05/09	110
Joy Muller, Chair, Copyright Interest Group Heads of Libraries and Learning Resources		
<b>International Publishers Association</b>	2018/05/09	110
Hugo A. Setzer, Vice-President Publishing		
<b>Ontario Book Publishers Organization</b>	2018/05/09	110
David Caron, President		

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Ryerson University</b> Ann Ludbrook, Copyright and Scholarly Engagement Librarian	2018/05/09	110
<b>Toronto Public Library</b> Susan Caron, Director Collections and Membership Services	2018/05/09	110
<b>University of Guelph</b> Rebecca Graham, Chief Information Officer and Chief Librarian Chief Librarian's Office Heather Martin, Copyright Officer E-Learning and Reserve Services	2018/05/09	110
<b>As individuals</b> Ann Brocklehurst Leslie Dema, President Broadview Press Jean Dryden Sandy Greer Lisa Macklem Andrew Oates Barbara Spurl Andy Turnbull Jessica Whyte, Digital Preservation Intake Coordinator University of Toronto	2018/05/09	111
<b>As individuals</b> Camille Callison, Indigenous Services Librarian PhD candidate, University of Manitoba Lynn Lavallée, Vice Provost Indigenous Engagement University of Manitoba Patricia Robertson, Author	2018/05/10	112
<b>Association of Manitoba Book Publishers</b> Annalee Greenberg, Editorial Director Portage and Main Press Michelle Peters, Executive Director	2018/05/10	112

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Manitoba Metis Federation</b>	2018/05/10	112
Georgina Liberty, President		
Sharon Parenteau, General Manager		
<b>University of Manitoba</b>	2018/05/10	112
Naomi Andrew, Director and General Counsel Office of Fair Practices and Legal Affairs		
Mary-Jo Romaniuk, University Librarian		
Althea Wheeler, Copyright Strategy Manager Office of Fair Practices and Legal Affairs		
<b>Winnipeg Arts Council</b>	2018/05/10	112
Alexis Kinloch, Public Art Project Manager		
Dominic Lloyd, Program and Arts Development Manager		
<b>Winnipeg School Division</b>	2018/05/10	112
Sherri Rollins, Chair of the Board of Trustees		
<b>As individuals</b>	2018/05/10	113
Todd Kevin Besant		
Daniel Elves		
Irene Gordon		
Michel G. Grandmaison		
Laurie Nealin		
Ryan Regier		
Brianne Selman		
Joan Thomas		
<b>As individuals</b>	2018/05/11	114
Carellin Brooks, Author, university and college instructor		
Maya Medeiros, Lawyer Norton Rose Fulbright Canada		
Jerry Thompson, Author and Journalist		
<b>Association of Book Publishers of British Columbia</b>	2018/05/11	114
Kevin Williams, Past President and Publisher Talonbooks		

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>British Columbia Library Association</b>	2018/05/11	114
Christine Middlemass, President		
Donald Taylor, Copyright Representative		
<b>Canadian Association of Law Libraries</b>	2018/05/11	114
Kim Nayyer, Co-Chair		
Copyright Committee		
<b>Canadian Association of Learned Journals</b>	2018/05/11	114
Rowland Lorimer, Treasurer		
<b>University of British Columbia</b>	2018/05/11	114
Allan Bell, Associate University Librarian		
Digital Programs and Services		
Susan Parker, University Librarian		
<b>As individuals</b>	2018/05/11	115
Noah Mackenzie Berson, Student		
Capilano University		
Devon Cooke, Documentary Film-maker		
Christina de Castell, Chief Librarian		
Vancouver Public Library		
Michal Jaworski, Lawyer		
Partner, Clark Wilson LLP		
Dusty Kelly		
Kim Nayyer		
George Opacic		
Susan Paterson		
Michael Serebriakov		
<b>Access Copyright</b>	2018/05/22	116
Roanie Levy, President and Chief Executive Officer		
<b>Copibec</b>	2018/05/22	116
Frédérique Couette, Executive Director		

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Council of Ministers of Education, Canada</b> Zach Churchill, Minister Nova Scotia Department of Education and Early Childhood Development Wanda Noel, External Legal Counsel Copyright Consortium	2018/05/22	116
<b>Canadian School Boards Association</b> Cynthia Andrew, Policy Analyst	2018/05/24	117
<b>Canadian Teachers' Federation</b> H. Mark Ramsankar, President	2018/05/24	117
<b>University of Calgary</b> Dru Marshall, Provost and Vice-President	2018/05/24	117
<b>Canadian Publishers' Council</b> David Swail, President	2018/05/29	118
<b>News Media Canada</b> John Hinds, President and Chief Executive Officer	2018/05/29	118
<b>Wikimedia Canada</b> Jean-Philippe Béland, Vice-President	2018/05/29	118
<b>Canadian Council of Archives</b> Nancy Marrelli, Special Advisor Copyright	2018/05/31	119
<b>Professional Writers Association of Canada</b> Christine Peets, President	2018/05/31	119
<b>Canadian Federation of Musicians</b> Alan Willaert, Vice-President from Canada (American Federation of Musicians)	2018/06/05	120
<b>Canadian Music Publishers Association</b> Margaret McGuffin, Executive Director	2018/06/05	120
<b>Gilde des musiciens et musiciennes du Québec</b> Éric Lefebvre, Secretary-Treasurer	2018/06/05	120
<b>Artisti</b> Annie Morin, General Manager Sophie Prigent, Vice-President	2018/06/07	121



<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Directors Guild of Canada</b> Dave Forget, Director of Policy National Office Tim Southam, President National Office	2018/06/07	121
<b>International Alliance of Theatrical Stage Employees</b> John Morgan Lewis, International Vice-President and Director of Canadian Affairs	2018/06/07	121
<b>Alliance of Canadian Cinema, Television and Radio Artists</b> Elliott Anderson, Director Public Policy and Communications, National Laurie McAllister, Director Performers' Rights Society and Recording Artists' Collecting Society	2018/06/12	122
<b>Audio Cine Films Inc.</b> Jean-François Cormier, President Hugo Desrosiers, Vice-President	2018/06/12	122
<b>Border Broadcasters, Inc.</b> Francis Schiller, First Director Public Interests Research and Communications Inc.	2018/06/12	122
<b>Music Canada</b> Graham Henderson, President and Chief Executive Officer	2018/06/12	122
<b>Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ)</b> Solange Drouin, Vice-President Public Affairs	2018/06/14	123
<b>Canadian Private Copying Collective</b> Lyette Bouchard, Chair Lisa Freeman, Executive Director	2018/06/14	123
<b>Re:Sound Music Licensing Company</b> Ian MacKay, President	2018/06/14	123

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Society of Composers, Authors and Music Publishers of Canada</b> Eric Baptiste, Chief Executive Officer Gilles Daigle, General Counsel and Head of Legal Services	2018/06/14	123
<b>Canadian Media Producers Association</b> Erin Finlay, Chief Legal Officer Stephen Stohn, President SkyStone Media	2018/06/19	124
<b>Canadian Musical Reproduction Rights Agency Ltd.</b> Caroline Rioux, President	2018/06/19	124
<b>Motion Picture Association-Canada</b> Wendy Noss, President	2018/06/19	124
<b>Society for Reproduction Rights of Authors, Composers and Publishers in Canada</b> Alain Lauzon, General Manager Martin Lavallée, Director Licensing and Legal Affairs	2018/06/19	124
<b>Writers Guild of Canada</b> Neal McDougall, Director of Policy Maureen Parker, Executive Director	2018/06/19	124
<b>Canadian Network Operators Consortium Inc.</b> Christopher Copeland, Counsel Christian S. Tacit, Barrister and Solicitor, Counsel	2018/09/19	126
<b>Movie Theatre Association of Canada</b> Michael Paris, Director Legal and Chief Privacy Officer	2018/09/19	126
<b>Professional Music Publishers' Association</b> Jérôme Payette, Executive Director	2018/09/19	126
<b>Société des auteurs de radio, télévision et cinéma</b> Stéphanie Hénault, Executive Director Mathieu Plante, President	2018/09/19	126

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Canadian Association of Broadcasters</b>	2018/09/24	127
Nathalie Dorval, Chair Board of Directors		
Susan Wheeler, Chair Copyright Committee		
<b>National Campus and Community Radio Association</b>	2018/09/24	127
Freya Zaltz, Regulatory Affairs Director		
<b>Stingray Digital Group Inc.</b>	2018/09/24	127
Annie Francoeur, Vice-President Legal and Business Affairs		
<b>BCE Inc.</b>	2018/09/26	128
Mark Graham, Senior Legal Counsel		
Robert Malcolmson, Senior Vice-President Regulatory Affairs		
<b>Rogers Communications Inc.</b>	2018/09/26	128
Kristina Milbourn, Director Copyright and Broadband, Legal and Regulatory Affairs		
David Watt, Senior Vice-President Regulatory		
<b>Shaw Communications Inc.</b>	2018/09/26	128
Jay Kerr-Wilson, Legal Counsel Fasken Martineau		
Cynthia A. Rathwell, Vice-President, Legislative and Policy Strategy		
<b>TekSavvy Solutions Inc.</b>	2018/09/26	128
Andy Kaplan-Myrth, Vice-President, Regulatory and Carrier Affairs		
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Mark Hayes, Partner Hayes eLaw LLP		
Howard P. Knopf, Counsel Macera & Jarzyna, LLP		
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Georges Azzaria, Director Art School, Université Laval		
Ariel Katz, Associate Professor and Innovation Chair Electronic Commerce, University of Toronto		
Barry Sookman, Partner with McCarthy Tétrault and Adjunct Professor Intellectual Property Law, Osgoode Hall Law School		
<b>Canadian Bar Association</b>	<b>2018/12/03</b>	<b>141</b>
Sarah MacKenzie, Lawyer Law Reform		
Steven Seiferling, Executive Officer Intellectual Property Law Section		
<b>As individuals</b>	<b>2018/12/05</b>	<b>142</b>
Pascale Chapdelaine, Associate Professor Faculty of Law, University of Windsor		
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Myra Tawfik, Professor Faculty of Law, University of Windsor		
<b>Copyright Board</b>	<b>2018/12/05</b>	<b>142</b>
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Kahlil Cappuccino, Director Copyright Policy, Creative Marketplace and Innovation Branch		
Pierre-Marc Lauzon, Policy Analyst Copyright Policy, Creative Marketplace and Innovation Branch		

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Martin Simard, Director Copyright and Trademark Policy Directorate		
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Michael Geist, Canada Research Chair in Internet and E-Commerce Law Faculty of Law, University of Ottawa		
Ysolde Gendreau, Full Professor Faculty of Law, Université de Montréal		
<b>Intellectual Property Institute of Canada</b>	2018/12/10	143
Catherine Lovrics, Vice-Chair Copyright Policy Committee		
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Carys Craig, Associate Professor of Law Osgoode Hall Law School, York University		
Meera Nair, Independent Scholar and Copyright Officer Northern Alberta Institute of Technology		
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Patti-Anne Tarlton, Chief Operating Officer		



## **APPENDIX B LIST OF BRIEFS**

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The following is an alphabetical list of organizations and individuals who submitted briefs to the Committee related to this report. For more information, please consult the Committee's [webpage for this study](#).

**Access Copyright (2)**  
**Adams, Bryan**  
**Adlington, Janice**  
**Akrigg, Mark**  
**Alberta College of Art and Design**  
**Alberta Machine Intelligence Institute**  
**Alliance des radios communautaires du Canada**  
**Alliance of Canadian Cinema, Television and Radio Artists**  
**American Registry for Internet Numbers**  
**Angelstad, Carley**  
**Art Dealers Association of Canada**  
**Artists and Lawyers for the Advancement of Creativity**  
**Association acadienne des artistes professionnel(le)s du Nouveau-Brunswick**  
**Association des radiodiffuseurs communautaires du Québec**  
**Association des réalisateurs et réalisatrices du Québec**  
**Association nationale des éditeurs de livres (2)**  
**Association of Book Publishers of British Columbia (2)**  
**Association of Canadian Publishers (2)**  
**Association of Manitoba Book Publishers (2)**  
**Association québécoise de la production médiatique**  
**Association québécoise pour l'éducation à domicile**  
**Athabasca University**  
**Atlantic Publishers Marketing Association (2)**

**Australian Copyright Council**  
**Australian Publishers Association**  
**Australian Society of Authors**  
**Authors Alliance**  
**Bannerman, Sara (3)**  
**Barker, George**  
**Barnard, Sara**  
**BCE Inc.**  
**Belcourt, Tony**  
**Bibliothèque et Archives nationales du Québec**  
**Blechinger, Joel**  
**Book Publishers Association of Alberta**  
**Bouchard, Mario**  
**Boyer, Marcel**  
**British Columbia Library Association**  
**Broadview Press**  
**Brush Education Inc.**  
**BSA The Software Alliance**  
**Business Coalition for Balanced Copyright**  
**Campus Stores Canada**  
**Canadian Alliance of Student Associations**  
**Canadian Artists' Representation**  
**Canadian Artists Representation Copyright Collective Inc.**  
**Canadian Association of Broadcasters**  
**Canadian Association of Law Libraries**  
**Canadian Association of Learned Journals (2)**  
**Canadian Association of Professional Image Creators (2)**  
**Canadian Association of Research Libraries**  
**Canadian Association of University Teachers (2)**  
**Canadian Authors Association (2)**

**Canadian Bar Association**  
**Canadian Communication Systems Alliance**  
**Canadian Copyright Institute (2)**  
**Canadian Council of Archives**  
**Canadian Federation of Library Associations**  
**Canadian Federation of Musicians**  
**Canadian Federation of Students**  
**Canadian Independent Music Association**  
**Canadian Legal Information Institute**  
**Canadian Media Producers Association**  
**Canadian Museums Association**  
**Canadian Music Publishers Association**  
**Canadian Musical Reproduction Rights Agency Ltd.**  
**Canadian National Institute for the Blind**  
**Canadian Network Operators Consortium Inc.**  
**Canadian Private Copying Collective**  
**Canadian Publishers' Council (2)**  
**Canadian Research Knowledge Network**  
**Canadian Retransmission Collective**  
**Canadian Teachers' Federation**  
**Canadian Urban Libraries Council**  
**Cato, Jacqueline**  
**Chapdelaine, Pascale**  
**Charbonneau, Olivier**  
**Cho, Nami**  
**Coalition for Culture and Media**  
**Colleges and Institutes Canada**  
**Concordia University**  
**Consumer Technology Association**  
**Copibec (2)**

**Copyright Agency**

**Copyright Licensing New Zealand**

**Copyright Visual Arts (2)**

**Corus Entertainment Inc.**

**Council of Atlantic University Libraries**

**Council of Ministers of Education, Canada**

**Council of Post Secondary Library Directors of British Columbia**

**Craig, Carys**

**Creative Commons**

**Cultural Capital Project**

**D'Agostino, Giuseppina**

**Dalhousie Faculty Association**

**Dermody, Kelly**

**Dessa**

**Directors Guild of Canada**

**Doctorow, Cory**

**Duimovich, George**

**Easton, Allison**

**Education International**

**Element AI**

**Emily Carr Institute of Art and Design**

**Engel, Sharon**

**Fazekas, Monica S.**

**Fédération des télévisions communautaires autonomes du Québec**

**Fédération nationale des communications**

**Federation of British Columbia Writers (2)**

**Federation of Canadian Municipalities**

**Fédération québécoise des professeures et professeurs d'université**

**Fernwood Publishing**

**Fesnak, Vera**

Field, Kenneth  
Friesen, Bernice  
Gajdel, Djanka  
Geist, Michael  
Gibson, Ian  
Google Canada  
Gow, Athol  
Graham, Derek  
Graham, Monica  
Greer, Sandy  
Guibault, Lucie  
Harvey, Matthew  
Hayes, Mark  
Henderson, Sakej  
Hoar, Erin  
Homanchuk, Alex  
Hotel Association of Canada  
House of Anansi Press / Groundwood Books  
Hutchinson, Christine  
Innerd, Charlotte  
Intellectual Property Institute of Canada  
International Alliance of Theatrical Stage Employees  
International Authors Forum  
International Confederation of Societies of Authors and Composers  
International Federation of Library Associations and Institutions  
International Federation of Reproduction Rights Organisations  
International Publishers Association  
Internet Archive  
Internet Archive Canada  
Internet Association

Isbister, Christian  
Johnston, A. J. B.  
Katz, Ariel  
Kelln, Ryan  
Knopf, Howard P.  
Langara College  
Lawrence, Jack  
League of Canadian Poets (2)  
Lee, James  
LePan, Don  
Library Association of Alberta  
Literary Press Group of Canada (2)  
MacEwan University  
Macklem, Lisa  
Maple Ridge Family History Group  
Martin, Heather  
Maynard, Luke  
McCutcheon, Mark  
McDevitt, Jennifer  
McGill University  
McLellan, Andrea  
Microsoft Canada Inc.  
Moisil, Ingrid  
Montreal Institute for Learning Algorithms  
Morris, Quaid  
Morrison, Heather  
Motion Picture Association-Canada  
Mount Royal University  
Mount, Nick  
Movie Theatre Association of Canada

**Music Canada**  
**Nair, Meera (3)**  
**National Campus and Community Radio Association**  
**National Centre for Truth and Reconciliation**  
**Neel, Lou-Ann**  
**News Media Canada (2)**  
**Newton Miller, Laura**  
**Ng, Albert**  
**NorQuest College**  
**ole Media Management**  
**Ontario Council of University Libraries' Digital Curation Community**  
**OpenMedia**  
**Organization for Transformative Works**  
**Oud, Joanne**  
**Outdoor Writers of Canada (2)**  
**Ozgan, Deniz**  
**Patriquin, Donald**  
**Petrie, Cheryl**  
**Pickering, Holly**  
**Playwrights Guild of Canada (2)**  
**Portage Network**  
**Pottier, Anne**  
**Professional Photographers of Canada**  
**Professional Writers Association of Canada**  
**Public Interest Advocacy Centre**  
**Public Lending Right International**  
**Quebec Library Association**  
**Quebec Writers' Federation (2)**  
**Racine, Pierre-Luc**  
**Regroupement des artistes en arts visuels du Québec (2)**

**Restaurants Canada**  
**Retail Council of Canada**  
**Reynolds, Graham**  
**Rogers Communications Inc.**  
**Rub, Guy**  
**Ryerson Students' Union**  
**Ryerson University**  
**Salmon, Helen**  
**Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic**  
**Saskatchewan Publishers Group (2)**  
**Scassa, Teresa**  
**Schoner-Saunders, Lisl**  
**Screen Composers Guild of Canada**  
**Shaw Communications Inc.**  
**Shokar, Charnjot**  
**Sigurdson, Victoria**  
**Sime, John**  
**Simon Fraser University**  
**Société civile des auteurs multimédia**  
**Société des auteurs de radio, télévision et cinéma**  
**Société des auteurs et compositeurs dramatiques**  
**Society for Reproduction Rights of Authors, Composers and Publishers in Canada**  
**Society of Composers, Authors and Music Publishers of Canada**  
**Sookman, Barry**  
**Southern Alberta Institute of Technology**  
**Stephens, Hugh**  
**Syndicat national de l'édition**  
**Tarantino, Bob**  
**Tawfik, Myra**  
**Tellis, Cecilia**



**TELUS Communications Inc.**  
**Tencinger, Irene**  
**The Writers' Union of Canada (2)**  
**Thomas, Matt**  
**Thomson, Ashley**  
**Tiessen, Robert**  
**Trosow, Samuel**  
**Tufts, Emily**  
**Undergraduates of Canadian Research-Intensive Universities**  
**Union des écrivaines et des écrivains québécois (2)**  
**Université de Montréal**  
**Université de Sherbrooke**  
**Université Laval**  
**Universities Canada**  
**University of Alberta**  
**University of British Columbia**  
**University of Calgary**  
**University of Guelph**  
**University of Lethbridge**  
**University of Manitoba**  
**University of New Brunswick**  
**University of Victoria**  
**University of Waterloo**  
**University of Winnipeg**  
**Vanderhaeghe, Guy**  
**Vector Institute**  
**Villanueva, Emily**  
**Waite, Nancy**  
**Wakaruk, Amanda**  
**Weiler, Mark**

**Wells, Katherine**

**Western University**

**Whittle, Sharon**

**Willinsky, John**

**Writers' Guild of Alberta (2)**

**Writers Guild of Canada**

**Writers' Alliance of Newfoundland and Labrador (2)**

**Writers' Federation of New Brunswick (2)**

## **REQUEST FOR GOVERNMENT RESPONSE**

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. 95, 96, 101 to 103, 106 to 124, 126 to 136, 139 to 146 and 155 to 163) is tabled.

Respectfully submitted,

Dan Ruimy  
Chair

## Dissenting Report from the Official Opposition Conservative Party of Canada on the Statutory Review of the *Copyright Act*

The Conservative Party of Canada members of the Standing Committee on Industry, Science and Technology would like to thank all the witness who appeared before the committee on this study, as well as all of those who submitted written briefs. Overall, we feel this final report includes many good recommendations that will improve Canada's copyright regime for users and rights holders alike. However, there were two specific items for which we could not support the recommendations in the report and in light of these concerns are presenting the following dissenting recommendations.

### Artist Resale Right

We heard from several witnesses who requested Canada introduce an Artist's Resale Right (ARR) in Canada. This right exists in some other nations and provides for a payment to go to the original artist when a gallery or art dealer sells a piece to a customer. Specifically, the artist would receive a piece of every subsequent sale after making the original sale themselves. The suggested number we heard from testimony was 5% of the sale being returned to the original artist.

The Committee heard several objections to an ARR in Canada. The first is that the sale of a painting or sculpture is a sale of a tangible good, as such, it is not appropriate for this topic to fall under a copyright review. While a creator may maintain copyright on a work, such as a song and license that work, they maintain the original version. If an artist sells a painting, that painting is now owned by another and they possess ownership rights. It is our opinion that copyright law is not the proper avenue to address this request.

A second problem is that, as a tangible good, for the Federal Government to implement such a right could face constitutional challenges. Section 91(23) of the Constitution Act, 1867 provides Parliament with the power to legislate over copyright matters, but the ARR could fall under provincial legislative powers under its section 92(13). If a province wished to proceed with such a right that would be their prerogative to do so, but it is outside Federal jurisdiction.

There was also the challenge of not having enough time in the study to explore alternative recommendations to an ARR. **There could be other policies the Federal government could enact that could achieve the goal of an ARR, namely to ensure artists are justly remunerated.** This issue merits further study.

The Conservative members of the Committee do not think it is appropriate for the Federal Government to implement an ARR in Canada.

### Recommendation 1

**That the Government of Canada not follow recommendation 9 in the main report and do not seek to implement an Artist's Resale Right in Canada.**

## Crown Copyright

Other than the unanimous agreement from witnesses that the Copyright Board should be reformed, the only universal point of agreement among witnesses was that Government should not continue to enforce Crown copyright. There was disagreement over how specifically the Government would change the Crown copyright rules, but no witness supported maintaining the current regime. While we heard from witnesses that the Committee should hold off on changing Crown copyright until certain court cases are ruled on, we feel it is important enough a topic to make a recommendation at this time.

The concept of copyright is designed so that creators of works can be remunerated for those works in a free market. Without protections, those works could be stolen and used by others for their own profit. These protections do not need to exist when the creator is the Crown. Works created by the Crown are inherently funded by the public and created in their interests. As such, they must belong to the public, and be freely accessible at any time. All laws, documents, official orders and court decisions are the property of the public and must be available to them.

We do not feel that creating an open license for Government created works is sufficient. This will still express Government ownership of these works, when the owners are the public who paid for their creation. There are also already adequate protections to ensure that sensitive material, such as works created by the Ministries of Defence or Health, are withheld from public view. **There do not need to be any copyright protections of those works. If the government determines they have lost classified material, they are not going to remedy that situation through copyright protections.**

Works that are funded by Government, but that Government does not directly create, such as those created by Government funded research or grants, should also be publicly available. Works that are paid for by the public and produced for the public good belong to the public and should be freely accessible by them. We also believe, however, that in certain cases when producing a work has significant cost, Government may employ a cost recovery model for public access to that work.

### Recommendation 2

**That the Government of Canada introduce legislation amending the *Copyright Act* to completely abolish Crown copyright.**

## **NDP SUPPLEMENTARY RECOMMENDATION: CROWN COPYRIGHT**

Crown copyright was added to the Canadian Copyright Act of 1921, based on language in the 1911 UK Act. This provision (Section 12) provides the government with control over the use, re-use, and distribution of government works, despite the fact that necessary controls are now rendered via the Access to Information Act, enacted more than 30 years ago (in 1983), and the Treasury Board Secretariat Policy on Communications and Federal Identity.

Due to this Canadians must ask for permission to re-use and distribute government works or risk a claim of copyright infringement. Such requests are often delayed and sometimes denied. In contrast, the United States Congress mandated in 1895 that federal government works in that country were not subject to copyright protection. Thus, U.S. federal works are freely available for re-use without threat of copyright infringement. This feeds the democratic deficit in Canada and creates a policy misalignment with our largest trading partner that puts Canadian innovators at a disadvantage.

Section 12 creates unnecessary and undemocratic barriers to the access and re-use of government information. There is no justifiable rationale for the government to hold economic control over publications that were created to fulfill a government mandate.

Economic incentives related to copyright are meant to encourage the creation of new works, but the creation of government works is motivated by factors associated with good governance, not economic gain. Indeed, the government's own policies make it clear that economic exploitation of government works is best conducted by private industry.

For more than four decades, parliamentarians (e.g., 1985 House of Commons Committee, MPs in the House of Commons, 1981, 1993 ), government employees (e.g., 1981 study, 1984 white paper, 2002 report ), and academics (e.g., Judge, Vaver, Dryden ) have recommended that Crown copyright be reviewed or abolished.

During the previous review of the Copyright Act, the Government of Canada received more than 200 submissions calling for Crown copyright to be abolished. As part of the current (2018/19) review, a range of stakeholder organizations and individuals have asked parliament to review and/or abolish Crown copyright.

Restricting re-use of government works is antithetical to the aims of open government and liberal democracy. In addition, the permissions process incurs administrative costs for government departments, who have been fielding such requests since a centralized agency was removed in 2013. This decentralization (and the lack of training or education for federal employees) has resulted in inconsistent approaches between departments, creating complexities and denials for legitimate requests made by Canadians.

In 2017, Copyright Librarian Amanda Wakaruk petitioned Parliament to remove copyright protection from publicly available government works. The petition was signed by almost 1,500 Canadians. In his response, Minister Bains (ISED) noted that parliamentarians will have an opportunity to consider provisions related to Crown copyright during the Copyright Act review.

### **Committee Observations and Recommendations**

- On page 45, the discussion of “two distinct functions” does not contribute meaningfully to the discussion of s.12. The “second function” of Crown copyright, also referred to on page 45, pertains to works covered under the Act as a whole (not Crown works covered under section 12). Therefore, relevant paragraphs can be deleted and related content should be removed from this section and addressed elsewhere in the report, perhaps as a section dedicated to statutory authority (not as part of the section on Crown copyright).

#### **Recommendation 11:**

This Recommendation should be reduced to one statement rather than two, as indicated below.

- Recommendation 11 should be revised to read: That the Government of Canada introduce legislation to amend the Copyright Act to provide that copyright is not available for:
  - (a) Statutes and regulations;
  - (b) Official orders and notices;
  - (c) Court and administrative tribunal decisions; and
  - (d) Any work prepared or published by or under the direction or control of the Government of Canada, unless there is an order of the Governor in Council that specifies otherwise in relation to a particular work.
- Exceptional materials for which Crown copyright protection might be preserved through an order of the Governor in Council should be clearly described, with some guidance around what might be a reasonable justification for such protection. Associated regulations could be developed in this regard.

The committee's recommendations for Crown copyright are inadequate and do not fundamentally address the problems it has created. They can be best characterized as dismissive of witness testimony, indulging in phoney arguments, undercutting significant

economic concerns and further jeopardizing cultural preservation and academic research. Accordingly, they cannot be supported.

### **NDP Recommendation**

Abolishing the current all rights reserved system of Crown copyright would support Open Government principles and related initiatives.

From the Private Members' Bill C-440 (Act to amend the Copyright Act (Crown copyright)) introduced in the 42<sup>nd</sup> parliament on April 9, 2019, the following clauses should be passed in legislation:

Section 12 of the Copyright Act is replaced by the following:

#### **No copyright**

- *"Without prejudice to any rights or privileges of the Crown, no copyright subsists in any work that is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department."*

#### **Copyright ceases to subsist**

- *"Without prejudice to any rights or privileges of the Crown, any copyright subsisting in a work referred to in section 12 of the Copyright Act, as it read immediately before the day on which this Act comes into force, ceases to subsist as of the day of that coming into force."*

These changes would abolish crown copyright and reinforce Canada's commitment to Open Government by making government works available for re-use without payment or permission and removes barriers to important work related to stewardship, scholarship, and journalism.

### **Written briefs to committee requesting removal of Crown copyright**

- Canadian Legal Information Institute  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10020436/br-external/CanadianLegalInformationInstitute-e.pdf>



- Council of Atlantic University Libraries  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10040854/br-external/CouncilOfAtlanticUniversityLibraries-e.pdf>
- Council of Post Secondary Library Directors BC  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10201979/br-external/CouncilOfPostSecondaryLibraryDirectorsOfBritishColumbia-e.pdf>
- Creative Commons  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9887146/br-external/CreativeCommons-e.pdf>
- Dalhousie Faculty Association  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9973654/br-external/DalhousieFacultyAssociation-e.pdf>
- Macewan University  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10008893/br-external/MacEwanUniversity-e.pdf>
- Maple Ridge Family History Group  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10276811/br-external/MapleRidgeFamilyHistoryGroup-e.pdf>
- Meera Nair  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9921772/br-external/NairMeera-e.pdf>  
Note: Microsoft Canada brief includes government reports in its list of “raw materials” that should be available for re-use in AI innovations:  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10008894/br-external/MicrosoftCanada-e.pdf>
- Microsoft Canada  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10008894/br-external/MicrosoftCanada-e.pdf>
- Mount Royal University  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9990281/br-external/MountRoyalUniversity-e.pdf>

#### **Written briefs requesting review / reform of Crown copyright**

- Canadian Federation of Library Associations. (August 1, 2018) Position Statement: Modernizing Crown Copyright. [http://cfla-fcab.ca/wp-content/uploads/2018/09/Doc12-CFLA-FCAB\\_statement\\_crown\\_copyright-Aug-1-2018-final.pdf](http://cfla-fcab.ca/wp-content/uploads/2018/09/Doc12-CFLA-FCAB_statement_crown_copyright-Aug-1-2018-final.pdf)

- Council of Atlantic University Libraries  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10040854/br-external/CouncilOfAtlanticUniversityLibraries-e.pdf>
- Canadian Council of Archives  
<http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10008890/br-external/CanadianCouncilOfArchives-e.pdf>

#### **Oral testimony supporting review or abolishment of Crown copyright**

- Canadian Association of University Teachers  
<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-101/evidence>
- Canadian Association of Research Libraries  
<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-102/evidence>
- Canadian Federation of Library Associations  
<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-103/evidence>
- Brianne Selman <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-113/evidence>
- Canadian Association of Law Libraries  
<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-114/evidence>
- Susan Paterson <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-115/evidence>
- Wikimedia Canada <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-118/evidence>
- Canadian Council of Archives <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-119/evidence>
- Creative Commons Canada and Open Media  
<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-134/evidence>  
<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-140/evidence>
- Michael Geist <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-143/evidence>